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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-294

STATE OF NEW YORK,

Petitioner,

against

THOMAS ALFRED RUPPERT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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STATE OF NEW YORK,

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THOMAS ALFRED RUPPERT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the captioned case *sub nom. The People of the State of New York* v. *Thomas Alfred Ruppert,* on the 9th day of June, 1971, which reversed the respondent's conviction and dismissed the indictment against him.

Citation to Opinions Below

The opinion of the Court of Appeals, which originally reversed the judgment of conviction and directed a new trial, is reported at 26 NY 2d 437 and is reproduced as Exhibit "A."

The original appeal is reported from the New York Supreme Court, Appellate Division, Second Judicial Department, without opinion, at 32 AD 2d 890.

The Trial Court on that proceeding rendered three written opinions, none of which is officially reported. The first, which directed a hearing on a motion to inspect the minutes of the Grand Jury, is reproduced as Exhibit "B." The second, which denied the respondent's motion to inspect the minutes of the Grand Jury, is reproduced as Exhibit "C." The third, which denied the respondent's motion to suppress his admissions to Dr. Zvi Almog, is reproduced as Exhibit "D."

The opinion of the Court of Appeals on the second appeal is not as yet reported officially and is reproduced as Exhibit "E."

The opinion of the New York Supreme Court, Appellate Division, Second Judicial Department is reported at 35 AD 2d 1017 and is reproduced as Exhibit "F."

The opinion of the County Court of Westchester County following the second hearing as to the voluntariness of the so-called Almog confessions is unreported officially and is reproduced as Exhibit "G."

Jurisdiction

The reversal of the respondent's conviction and the dismissal of the indictment against him by the New York Court of Appeals is a determination by the highest State court in which a decision could be had. The jurisdiction of this Court is invoked under 28 U.S.C., § 1257 (3), the petitioner claiming rights, privileges and immunities under the Fifth Amendment to the Constitution of the United States.

Questions Presented

In the opinion of the petitioner the following questions are presented:

1. Whether in the circumstances of this case the respondent's admissions to Dr. Zvi Almog were so impermissibly tainted as to require their exclusion from evidence.

2. Whether in the circumstances of this case the respondent's admission to the police officers were impermissibly secured in terms of this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436.

Constitutional and Statutory Provisions

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

New York Code of Criminal Procedure, § 518-a

> **"§ 518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken.** In taking an appeal from an order granting a motion for the return of property or suppression of evidence or for the sup-

pression of a confession or admission 'or for the suppression of eavesdropping evidence' pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, or of the eavesdropping evidence ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission or eavesdropping evidence in question, unless and until the order of return or suppression is reversed on appeal and vacated."

New York Code of Criminal Procedure, § 813-g

"**§ 813-g. The motion in general.** A person claiming to be aggrieved by an involuntary confession or admission may move the suppression of such confession or admission from use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the confession or admission shall not be admissible in evidence in any criminal pro-

ceeding against the moving party. The order granting such motion may be reviewed on appeal.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

Statement of the Case

The respondent was convicted on June 13, 1967 in the County Court of Westchester County, Honorable Robert E. Dempsey, J., and a jury of the crimes of Felony Murder, First Degree, twelve counts; Arson Murder, First Degree, twelve counts; and Arson, First Degree, one count. Upon such convictions he was sentenced to twenty-four terms of imprisonment of the remainder of his natural life and on the arson charge to a term of ten to twenty-five years, all such sentences to run concurrently.

On December 20, 1965, at about 5:00 P. M., a fire of incendiary origin engulfed the interior of the Jewish Community Center in Yonkers, New York, and reduced it to rubble. The burning material produced dense concentrations of lethal carbon monoxide fumes which killed nine children who were on the fourth floor taking music lessons, two teachers, and a mother who had brought her daughter for a violin lesson. On January 24, 1966, after weeks of hedging and telling half truths, the appellant finally admitted to the Center's executive director, Dr. Zvi Almog, that he had deliberately started the fatal fire.

In order to understand this case fully, one must go all the way back almost to the indictment which was filed in the Office of the County Clerk on May 27, 1966 (15). Thereafter on June 29, 1966 the respondent moved to inspect the Grand Jury minutes on essentially two grounds. The first was the allegation of the general insufficiency of all the evidence to warrant the indictment, and the other

was the supposed invalidity of the confessions given by the appellant to the police (20-27).* The County Court, Dempsey, J., held that due to non-compliance by the police with the mandates of the then new *Miranda* v. *Arizona*, 384 U. S. 436, which had been decided in the interval between the indictment and the motion, all statements made to the police by the respondent were suppressed (17). That brought the Court to the statement given by the respondent to Dr. Zvi Almog, the executive director of the Jewish Community Center. The question thus was a definition of Almog's role in the investigation. Was he assisting the police and was he therefore a police agent, *People* v. *Robinson*, 13 N. Y. 2d 296, or was he pursuing an independent line of inquiry as to which the *Miranda* precepts had no application? To resolve this question, the Court directed a hearing (18-19). (Cf. Exhibit "B".)

The hearing thus ordered was conducted between January 10, 1967 and January 26, 1967, before the Court, Dempsey, J., sitting without a jury (168). At the beginning of the hearing, the prosecutor moved in open court that its scope be broadened to include evidence on and an adjudication of whether or not the admission to Dr. Almog was voluntary. Although the respondent on the trial protested bitterly about this procedure (1564), the fact is that when the motion was made to enlarge the range and purpose of the hearing, the motion was granted with the specific acquiescence of respondent's attorney upon her conclusion that

> "I suppose we might get another bite out of the cherry with another hearing, but I don't know that its absolutely necessary for the interest justice (sic)." (169)

Dr. Almog was the People's only witness. He testified that the respondent had worked in the Jewish Community Center from October, 1965, on, as an employee of the Youth

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* Numerals in parentheses refer to pages of the printed record to the Court of Appeals.

Corps Administration of the City of Yonkers (176). On December 20, 1965, Almog was notified at home of the fire at the Center. He went there as quickly as he could, arriving approximately at 5:20 to 5:25 P. M., and raced into the building. He got as far as the third floor and came back down and at about 5:40 to 5:45 P. M. he met the respondent outside the building (176). Ruppert showed Almog his finger and said he had burned it trying to extinguish the fire. Probably Almog couldn't have cared less, but he patted the respondent on the shoulder and said, "You're a good boy, Tommy" (177).

Almog didn't see the respondent that evening or the next day, but on the following Wednesday, December 22nd, they met again at the Yonkers Police Headquarters in the early afternoon (177). The respondent approached Almog and said that he was sorry about what happened at the Center, and, startlingly, added that every time there's a fire he's accused of it (178). Later on the same day, about 6:30 P. M., Almog again saw the respondent, but, aside from an exchange of greetings, there was no further conversation between them (178).

The police investigation which necessarily followed this holocaust had, by the twenty-first, produced information which caused Almog to entertain serious suspicions about the respondent and these, coupled with the gratuitous information that Ruppert was always being accused of setting fires, troubled Almog to a point where he requested additional concentration on the investigation of the respondent (241-259). They did not see each other again, however, until about December 29th. At that time, Ruppert came to the Center with several detectives, and he told Almog that he had come to show the detectives where he had been "flicking cigarettes" on the afternoon of the fire (179). In Almog's judgment, all of this information well warranted the respondent's arrest, but, try as he might, he couldn't convince anyone else that he was right. He spoke to the captain of detectives, the chief of police, and finally

to the district attorney, and from each he received the uniform answer that the police were running the investigation and, in effect, that he should mind his own business (179-182).

Rightly or wrongly, reasonably or unreasonably, Almog couldn't get the idea out of his head that Ruppert, for his own sake as well as for that of the whole community, had to be restrained, so he determined to make his own investigation (181-184). To this end, he sent for the respondent around January 5, 1966 (281-282) with a view towards questioning him about his activities on the afternoon of the fire. He had initially requested the police to install recording equipment in the Center so that the police could overhear the conversations he proposed to have with Ruppert, but upon being told by them that this was impossible, he asked that they at least send a detective (183-185). Pursuant to this request, Detective Leslie Feuer was assigned to the Center (185).

Feuer was introduced to the respondent as a fellow worker who was also assigned to cleaning up the place. He and Ruppert worked together for three or four days, but the respondent refused to associate with him, so at Almog's request Feuer's assignment was terminated. The respondent never made any admissions to Feuer of any kind (190-192). Failing in this effort, Almog then came up with the suggestion of having a bogus meeting of the Center's Board of Governors. He suggested this to the police on January 13, 1966. The thought was that he would tell Ruppert that his own, Almog's, conduct was being examined by the Center itself to determine to what extent his negligence might have contributed to or been responsible for the fire, and that Ruppert and another worker with whom he had been that day, an Andrew Corsino, were going to be interrogated by the Board of Governors in order to assess Almog's behavior. Ruppert was also to be told that Almog's job might be on the line if the Board found he had been careless (194-196).

The police department adopted the plan, and the meeting was held on the following day, January 14th. It was attended by Almog, Corsino, Ruppert, Detective Sergeant George Poger, and Detectives Richard Swerdlove, Murdo Urquhardt, and Walter McClain (196-197, 470, 477). No member of the Board of Governors attended. At that meeting, which lasted about three hours, the respondent stated that he had thrown a cigarette into a pail on the landing in the rear stairwell between the third and fourth floors, that he had seen flames arising from the pail, and that he left, leaving the fire burning in the pail (473-474). Thus shored up in his belief, Almog renewed his demands on the police that the respondent be arrested, but his only satisfaction was their promise to review the taped recording of the whole meeting (197).

Almog next encountered the respondent on January 19, 1966, but they simply exchanged greetings. At that time, about 3:30 P. M., the respondent was sitting in a car with a couple of detectives. Later on that evening, at about 10:00 or 10:30 P. M., Almog received a call from the police asking him to come to the Center. He was picked up at home by Detective Armiento and driven to the Center. The detective told him that Ruppert had told him something about kicking a bucket of paint and that he had to look for a paint bucket. He searched the second, third and fourth floors unsuccessfully, so they then went and examined the paint locker. The detective took two different kinds of orange colored cans and left (198-200).

On January 24, 1966, Almog sent for the responent to shovel snow, but always in the back of his head was the thought he might get information on the fire (311). Ruppert arrived at the Center about 2:30 P. M., and Almog asked him if anything had happened when he was in the detectives' car a few days earlier. He replied that he had been lying to the police, but that day he had told them the truth, that he had kicked the bucket downstairs. Almog then set up a tape recorder and recorded a conversation

he then had with the respondent in his office. Almog was aghast that, if the police knew what he knew, they had not arrested Ruppert, and this tape he was making was to document his report of the case to the Center's Board of Governors, the real one this time (200-202).

In the interview that followed, Ruppert said that on December 20, 1965, after he had finished his work assignment for the day, he and Corsino had gone to the fourth floor to fool around with the pianos but were chased out by a music teacher. He then went to the fourth floor landing of the rear staircase, where he dropped a match into a bucket, setting fire to its contents. He said that he intended to start a small fire and then to discover it, extinguish it, and be the hero of the day (205). Almog immediately took the tape to the police, but when they tried to listen to it they couldn't because it was too indistinct. He gave them a statement, though, and left (206).

The same evening, about 7:00 P. M., Almog was having his supper at home when he received a telephone call from Ruppert. It would be well to remember, in the light of subsequent events, that it was Ruppert, not the police, who called Almog (207). The respondent said it was urgent that he talk to Almog about the fire, and he couldn't do it on the phone. He wanted Almog to come to police headquarters. Almog tried to fob him off, but he insisted, so, after calling the police and receiving permission to do so, Almog went to headquarters, arriving at about 8:15 or 8:20 P. M. He saw Ruppert briefly and was asked by him to wait a few minutes because he had to reread a statement he had given and sign it. Almog waited in an anteroom until 9:10 to 9:20 P. M., at which time the respondent was ready, and they left the building together (207-208).

Almog drove the respondent home, and en route and sitting in the car after they arrived, Ruppert finally told Almog the truth. On the afternoon of the fire, he and Corsino had gone to the fourth floor to play with the pianos,

but they had been sent away by a violin teacher. At that point, the two separated. He had what he described as an urge to set a fire, so he went down to the first basement to the paint closet. There he picked up an orange colored can three-quarters full of some smelly liquid which bore a red sign identifying the contents as highly flammable. He took the elevator to the third floor and walked to the rear stairway and up to the fourth floor. He barricaded the hallway door to avoid being interrupted and poured the liquid on a pair of two by fours, cartons, etc., which were on the stairs. Pouring as he went, he made his way to the third floor and into the balcony, where he poured the remaining liquid over the material stacked to the left of the doorway. He threw the can away and lit the fire. The size of the resulting blaze frightened him, so he went downstairs to the gym where he again met Corsino (210-214).

After Ruppert went into the house, Almog returned to police headquarters, where he gave a statement. He testified that he had never seen any statements of Ruppert in the hands of the police, nor listened to any police recorded interviews with Ruppert, nor even been informed what, if anything, Ruppert had ever told the police (214-215).

Almog was interrogated quite extensively on cross-examination, but his testimony remained essentially unchanged, and at the termination of the Almog testimony, the Court ruled from the bench that the evidence before the Grand Jury sufficiently warranted the indictment they returned (327). In the special context of this case, that was also an implicit ruling that Almog's activities were those of an agent entirely independent of police orientation, direction and control (Cf. Exhibit "C").

The hearing then proceeded towards its remaining goal, a determination of whether or not the respondent's admission to Almog was voluntary. The respondent called as witnesses no fewer than twelve police officers and an assistant

district attorney (370-690, 722-821). They testified to various contacts between respondent and themselves, but, because there was inherent in the Court's ruling the clear holding that the admission to Almog was not produced directly or indirectly by police activity, the testimony of these people cast little or no light on the question at issue, and the reason for their being called at all remains, even now, obscure.

In addition, the respondent called a gentleman who in 1964 and 1965 was his teacher at the Hawthorne Cedar Knolls School, a residential treatment center for emotionally disturbed adolescents (692). This teacher, Mr. Herbert J. Friedman, testified that the respondent basically was a good student and that once he had admitting taking a pen from another student, an act it was later discovered he hadn't done (695-699).

Finally, the respondent called Dr. Levon Z. Boyajian, a psychiatrist (820). Boyajian was asked to assume as fact all of the respondent's reported background, his family and his failure to adjust to that environment as well as his experiences thereafter at Hawthorne Cedar Knolls. He was also asked to assume as fact all the circumstances of the fire and respondent's attendant interviews with Dr. Almog and the police. He was then asked if he was thereby enabled to form an opinion as to whether or not the respondent would be susceptible (820-828). He stated that in his judgment this would be so because the authoritarian relationship which Almog bore to the respondent would encourage him to think of Almog as a parent substitute and person who should be catered to and pleased (828-840).

At the conclusion of the full hearing, the Court found the Almog admission to have been voluntarily given and hence admissible (32-45). (Cf. Exhibit "D".)

The trial of this case began on April 13, 1967. Initially the Court's attention is respectfully referred to People's

Exhibits Nos. 1, 2, 3 and 4 in Evidence (2888-2896). These exhibits, the number of each of which corresponds to the floor it represents, are scale drawings prepared by an architect employed by the City of Yonkers (911-912), which show the structural dimensions and plans of each of the floors of the Jewish Community Center as they existed on December 21, 1965, the day after the fire (913).

From about April, 1965, until December 20, 1965, the Center was almost continually in a state of progressing renovation. It began with the installation of the elevator which is shown in each of the floor plans at the lower left hand corner (930). It further included the redecoration of the auditorium, the social hall, the gymnasium, and some meeting rooms (931) on the second floor (Exhibit No. 2) and enclosing the balcony on the third floor (935-936, Exhibit No. 3). In addition on the third floor a good bit of rewiring was being done in a small room immediately adjacent to the rear stairway so that it could be equipped with apparatus which would permit a technician to view stage productions from there and to regulate onstage lighting (937, Exhibit No. 3). Air conditioning equipment was also being installed on the balcony, and the floor had been bored through to permit the installation of ducts which would carry the cool air down into the auditorium (938-940). These ducts are diagrammed on Exhibit No. 3 and are identified as "Holes In Balcony Floor."

On the afternoon of the fire, the only workmen in the building were three electricians (994) who were installing cove lighting in the second floor auditorium, and pulling wire through conduits (960, 969-971). All the wire all three men were working on was dead, and as a matter of fact the only energized wire in the whole of the balcony led to a couple of light fixtures recessed into the ceiling and an exit sign over the door (972-973). The auditorium was lit by temporary lighting which could probably best be likened to a string of Christmas tree lights containing regular seventy-five or hundred watt bulbs, and which

was suspended from the ceiling and ran from wall to wall (981, 993, 1890-1891, Exhibit No. 3).

The balcony was to a degree used as a storage room for some purposes. Accordingly, there were fifteen or twenty canvas stage backdrops against the balcony wall adjacent to the dimmer room where the initial "B" appears on Exhibit No. 3. To the left of the adjacent balcony doors, approximately where the second initial "B" appears on Exhibit No. 3, was a stack of wooden folding chairs about three and one-half to four feet high (975-976). Further down the balcony, approximately where the word "Balcony" begins in the legend "Holes In Balcony Floor", there was a stack of four or five wooden bazaar stands. About where the words "Holes" appears in the same legend, the electricians had stored twenty or so cartons of eight foot fluorescent fixtures (978-979). When the electricians quit work for the day at 4:00 P. M., this was the condition of the balcony (978, 980).

On December 20, 1965, a group of young teenage girls who belonged to a social club called Les Charmants gathered in the Youth Lounge of the Center for a club meeting (1074-1075). That room is identified by the initial "G" on Exhibit No. 1 (1786). The meeting itself was held in the very small club room at the bend of the corridor in Exhibit No. 3 (1075-1076). After the meeting, they went back to the Youth Lounge for a party. About 4:55 P. M., when it was time to go home, all the girls returned to the third floor club room for their coats, but three of them, Lesley Adler, Beth Schneider and Susan Raisner, went down to the girls' bathroom, the one shown near the upper right corner of Exhibit No. 3 (1077). As they walked along the hall on the North Broadway side of the building on the third floor, they smelled smoke, and although the odor persisted they went on down the Guion Street hallway to the bathroom. When they left they again passed the balcony doors near the girls' bathroom, and one of them, Beth, opened the right hand balcony door slightly.

Both Beth and Lesley observed smoke in the balcony (1078-1082, 1093-1094). It must have been immediately thereafter that another girl reported smelling smoke to the club leader, Miss Berman, and she hustled all the girls downstairs. She was the last to leave the club room, and by that time the first gray smoke was coming from the Guion Street corridor into the South Broadway corridor on the third floor (1107-1108).

Lester Cohen, the program director of the Center, at 5:00 P. M. was in the office at the Guion Street-South Broadway corner of the first floor (Exhibit No. 1, 1123). His attention was attracted by children, perhaps Miss Berman's, running and shouting "smoke." He rushed into the lobby with a Mr. Hertz and asked where and was told the fourth floor. He sent Hertz up the front stairway, and he took the elevator to the fourth floor. When the elevator doors opened, he was engulfed in an opaque mass of thick, black, acrid smoke. He could hear screaming, but the heat and smoke was so intense that about all he was able to do was to make his way to the front stairway and back down to the first floor (1123-1127).

The events we have heretofore described almost surely extended to 5:10 or even 5:15 P. M., and during all this frantic activity in the remainder of the building much was occurring on the fatal fourth floor. Therefore we must go back in time to shortly before 5:00 P. M. or approximately the time the three youngsters first saw the smoke in the third floor balcony.

On one afternoon and evening per week the Bronx House Music School conducted music classes on the fourth floor of the Center from 3:00 to 9:00 P. M. (1158-1159). At about 5:00 P. M. on December 20, 1965, there were, as nearly as we can make it out, twenty-five or thirty people on the fourth floor, most of them children. Some were actually in class at that point (1202, 1227, 1249, 1263), while others were waiting for a 5:15 P. M. lesson (1226,

1232, 1257). Mrs. Grace Niclas, the registrar of the school, was in the office next to the front stairway which is identified on Exhibit No. 4 as the office in which appears the legend "Pipes Thru Floor" (1160). With her was Andrew McKinley, the head of the school (1161), and Mrs. Lucille Sachs, one of the victims, who had brought her daughter Sandra for a violin lesson (1162). Mary Metcalfe, the violin teacher, upon Sandra's arrival had left that office and with Sandra had gone to the rear room on the Guion Street side of the building across the corridor from Handball Court No. 1 (1211-1213). Lily McKinley, a piano teacher, was giving a lesson in Studio No. 1 to a child named Nancy Lubin (1202, Exhibit No. 4), Anne Kepler, another of the victims, was a flute teacher and was conducting a lesson in Room 3 (1165, 1192, Exhibit No. 4). Mrs. Elizabeth Le Feber, yet another victim, was teaching a class in theory in Room No. 4 (1169, 1174, 1182, 1235, Exhibit No. 4), and all of the children who died were in that class (1174).

It will be noted that Sandra Sachs arrived two or three minutes late for her 5:00 P. M. appointment (1212). Very shortly after Mrs. Sachs entered the office and Miss Metcalfe left it, a Mr. Arzewski appeared and called Mr. McKinley outside. Immediately on returning, McKinley directed Mrs. Niclas to call downstairs and say that he either could smell or could see smoke. As she turned to comply with that instruction, she herself observed smoke coming up from the first floor through a hole that had been made to accommodate several vertical pipes. McKinley dashed out to alert the others while Mrs. Niclas remained on the phone to determine what was going on. She finally threw the phone down and ran out of the office leaving Mrs. Sachs there alone (1162-1164).

McKinley went first to his wife in Room No. 1 (Exhibit No. 4) and ordered her and her student into the hall. He went next to Room No. 2 (Exhibit No. 4), the "waiting room," and directed all the children he found there into

the hall. He and Mrs. Niclas herded their charges towards the front staircase and found the way closed to them by dense clouds of billowing light colored smoke which quickly changed to thick heavy dark smoke (1165, 1190-1191). McKinley dashed into Room No. 3 (Exhibit 4) and got Miss Kepler and her pupil out into the hall (1192) where they were apparently joined by Mrs. Le Feber and her theory class (1235).

Miss Metcalfe, meanwhile had begun to smell smoke, but she at first thought it was burning rubbish. Almost as soon as they had begun the lesson, she heard Mr. McKinley yelling, "Fire!", so she opened the hall door. She was confronted by a wall of solid, black, acrid smelling smoke, so she slammed the door instantly. She considered all possible avenues of escape and abandoned all but the window, so the pair of them, Miss Metcalfe and Sandra, went out the window and inched along a ledge to get clear of the smoke that, even with the door closed, was filling the room behind them (1213-1214).

The same thick black smoke that had prevented Miss Metcalfe's entering the hall from her room at the end of the hall had swept on down the Guion Street hallway and cut off the rear stairway as an effective means of escape for the children and teachers who were in the hallway. Mrs. Niclas, five children, and Mrs. Blumenstein, a parent, were able to get into Room No. 2 (Exhibit No. 4, 1167, 1244). Mrs. Niclas heard screaming from Room No. 4 (Exhibit No. 4) and tried to get to that room through the hall. She was prevented from doing so by the smoke and had to retreat to Room No. 2 (Exhibit No. 2, 1167-1169). As Miss Metcalfe down the hall had done, the people in Room No. 2 had concluded that going out the window was the only answer, so they too squirmed out on the ledge (1244).

Mr. and Mrs. McKinley had gotten somehow into Room No. 5 (Exhibit No. 4) and they came to the same conclu-

sion as had the others; their one chance of surviving was going out the windows, so they too wound up on the ledge (1193-1194). The mental agony that all of these people were experiencing can surely be no more starkly dramatized than by a simple reference to People's Exhibit No. 5 in Evidence (2897).

Mrs. Le Feber, when she saw that retreat was cut off, directed all the children to enter the room nearest to them and open the windows. She among others entered Room No. 4 (Exhibit No. 4), but she appears to have been the only adult in that particular room. The first children who entered it, instead of going out the window, though, the tactic that saved the occupants of the other rooms, simply lay across the window sills and blocked the windows. Further complicating the situation in Room No. 4 was the fact that no one ever closed the doors, so that the smoke had unrestricted access to the interior of the room (1258-1260, 1265-1267). The bodies of all twelve victims were discovered in this room by Fireman Quido Liberati (1403-1404). The medical and scientific studies later conducted on those bodies indicated that in each case death was caused by smoke poisoning (1738-1767).

The records of the New York Telephone Company reflect that the first report of fire to the Fire Department was made from the Jewish Community Center at 5:07 :08 P. M. on December 20, 1965 (1288, People's Exhibit 26 in Evidence, 2903). That alarm was received by Fire Dispatcher John P. Terry (1303). Two and a half minutes later, the first pieces of fire apparatus were rolling up in front of the Center (1320). The first alarm was answered by three Engine companies, two Truck companies, the Rescue Squad, and an Assistant Chief (1309-1310). The Chief, James B. Ryan, spotted flames coming out of the third floor north windows, and he immediately ordered a second alarm which was answered by three more Engine companies and another Truck (1310).

The obvious hazard to human life represented by all of these children precariously perched on the fourth floor ledge prompted Ryan to order the Truck companies to get their aerial ladders aloft and get these people down (1321), a decision which later was defended, and not without a certain bitterness, by Assistant Chief John Moore (1383-1384). Meanwhile, as each Engine company arrived, its men were ordered by Ryan to one or the other of the two stairways with hose lines. The Rescue Squad was ordered to "get between" the flames and anyone who was trapped in the building (1321). The Engine companies advanced up the front and rear stairways as far as the third floor, but they were stopped there by the intense heat (1321-1322, 1353, 1386). The second alarm Truck company ventilated the roof, allowing this incredible heat and smoke to escape, and only then was the Rescue Squad able to get to the fourth floor and make its grim discovery of the bodies (1322-1323, 1401-1402).

At 5:13 P. M., which would be just a couple of minutes after the first firemen arrived (1320), the fire, in the words of Chief Ryan:

> ". . . had possession of the auditorium, the balcony, and the third floor corridor, and was extending up rear stairway." (Defendant's Exhibit F in Evidence, 2929)

It was brought under control at 5:55 P. M., and command was surrendered to Assistant Chief Stephen T. Smith at 6:05 P. M. (1381, 1406). The last company left the Center about 10:30 or 10:40 P. M., and periodically through the night Smith checked it. A watch line crew, a charged hose and a few men to operate it, remained all night (1409).

Once the fire was extinguished, there came the more wearisome work of discovering by what agency it had begun. One obvious possibility was, as it is with any fire, that it had been triggered by some electrical malfunction. On the morning after the fire, though, three Yonkers city

electric inspectors and two electric inspectors from the New York Board of Fire Underwriters examined the building with just that idea in mind. They were unable, however, to discover any evidence or indication that the fire had an electrical origin (1416-1419).

On the same day, December 21, 1965, the police requested the assistance of Joseph A. Butler, Jr., an arson investigator regularly employed by the American Insurance Association, who examined the building (1865-1868). Without at this point discussing his entire testimony, because we will return to it, Butler's inspection convinced him that the fire was deliberately set by some human agency (1886).

On February 28, 1966, at the request of the District Attorney's Office, the building was examined once more by John Brady, a chemist and toxicologist (1458, 1481-1482). He was qualified as an expert in those fields (1458-1461). He went through the whole building from top to bottom. On the second floor he ran into his first fire damaged area, some smoke charring and the effects of extreme heat. There was a certain amount of debris on the floor of the auditorium which had apparently burned off the underside of the balcony. In addition, there were isolated burn spots on the stage and charring *down* from the balcony level. He dismissed any possibility that the fire had begun on the second floor (1462, 1465). Moving upward, he entered the balcony. He observed burned areas that in some places began as high as two feet off the floor and that ranged upwards to the ceiling. There was considerable burning throughout the balcony, but it was especially noticeable in the southeast corner, that corner nearest the double doors near the upper right corner of Exhibit No. 3. Paint, wood and metal were all severely split and cracked. Against the balcony wall adjacent to the dimmer room (Exhibit No. 3), there had been serious burning, but not nearly so much as was observable just to the left of that double door. There the cement floor and a nearby cement

column had been pitted and split, indicating a drastic degree of burning. Brady estimated that the fire in this area had been between nineteen and twenty-one hundred degrees (1462-1464).

Brady concluded from all of his observations and from evidence that an ordinary fire would not cause that an accelerant of some sort had to have been used. Close examination and scraping of the floor of the balcony, the corridor outside the double door, and on over to the rear staircase produced what he called a carbonaceous residue which he retained for later testing (1464). The accelerant or additive residue Brady found on the floor both of the balcony and of the corridor he believed was a liquid because of the splash pattern which he found the residue (1491-1492). It was also his opinion that the fire was fed by air which rose through the duct holes in the balcony floor (1464).

Brady also examined the fourth floor. He again found the effects of heat and some combustion caused chiefly by autoignition, i.e., smoke which at a certain temperature actually ignites. He discovered no evidence from which he could conclude that the fire began on the fourth floor, and in some areas up there saw indications which pointed back again to the third floor (1464-1466). There was no burning of any kind in the dimmer room (1467). In his opinion, the fire originated just inside and to the left of the double doors to the balcony on the Guion Street side of the building (1468).

As a part of the renovation of the auditorium, the balcony had been enclosed. A three foot high railing had been removed, and in its place was installed a plastic screening material, described as Acrylite in a Casbah pattern (cf. Defendant's Exhibit R-1 in Evidence, 2949). Of a total nine foot floor-to-ceiling rise, the top foot and the bottom foot were wooden and the central seven feet were Acrylite (935-936). As a part of his scientific analysis,

Mr. Brady examined Acrylite in his laboratory. From this testing and from his observations at the Center, he was able to form an opinion that the Acrylite balcony wall when subjected to a flame which would create a temperature of three to four hundred degrees for five minutes would ignite and thereafter would accelerate in a geometric progression of one inch per minute (1468-1470).

He also ran tests on Acriseal and Polytoc A. C., both of which ignited readily (1471). Just to identify the substances quickly, both Polytoc A. C. and Acriseal had been shipped to the Center to be used in the renovations. The cans of each were orange colored, and they were stored in the paint locker in the sub-basement (1587). Since the appellant had confessed to Zvi Almog that he had started the fire by using material which was stored in the paint locker in an orange can (1594), it seemed reasonable to ask Mr. Brady if he could examine these two substances and come to any scientific conclusions concerning them. He was able to say only that they burned easily and that the carbonaceous residue left by each when it was burned on tile was similar to the carbonaceous residue he scraped up off the tiled floor of the balcony (1470-1472).

Mr. Brady stated that from his tests and observations, and assuming the truth of the other evidence in the case, his opinion was that the fire was begun by the addition of an accelerant to the wooden chairs stacked just inside and to the left of the balcony doors on the Guion Street side of the building and by igniting that accelerant with a match. He further stated that the resulting fire ignited the wooden floor louvers of the balcony wall which in turn set fire to the Acrylite, which fire raced around the Acrylite of the entire balcony, producing the dense, acrid black smoke to which the occupants of the fourth floor testified (1477-1479). The burning of this material would produce a lethal carbon monoxide (1511) which would accord with the medical and scientific findings from the autopsies (1738-1744).

On the day of the fire, the respondent had been working with a young man named Andrew Corsino. They were assigned that day to clean up the Youth Lounge, the area marked with the letter "G" on Exhibit No. 1 (1786). When they finished work, they dawdled around for a while and at about 4:50 P. M., at Corsino's suggestion, they went up to the fourth floor to fool with the pianos (1540-1542). They walked almost to the end of the hall, into a big room, through the bathroom between and into a smaller room (1542-1543). Here they were stopped by a violin teacher, almost surely Miss Metcalfe (1216), who told them they couldn't stay there (1543). At that point, they separated (1543). It had to be then sometime before 5:03 P. M. because Miss Metcalfe's being alone indicated that Sandra Sachs had not arrived, and she arrived at just about that time (1212). Corsino left the respondent on the fourth floor near the rear staircase (1543) and he, Corsino, went back down to the Youth Lounge. He remained there for a bit, tried the rear staircase door, which he found locked, and walked back to the front of the building. He waited a short time for the elevator and when it came went in it up to the second floor, where he met the respondent right outside the auditorium doors (Exhibit No. 2). It is Corsino's recollection that it was then 4:55 P. M. (1544-1545).

Corsino and the respondent went through the auditorium and down the rear staircase towards the gymnasium (nothing below the first floor was diagrammed for this trial). En route, Corsino asked the respondent for a cigarette, and the respondent lit it with his lighter (1545), a lighter he later claimed was out of fluid and in the pocket of a jacket to which he had no access (2042-2043). When they got to the gym, the teacher wouldn't let them in with the cigarette, so Corsino put it out and they went in (1545). They were still there a few minutes later when they smelled smoke. Corsino ran and didn't see the respondent again until shortly afterwards when the respondent appeared

near the door of the Youth Lounge with his eyes glassy, in Corsino's opinion, from smoke. They both ran across the street to St. Joseph's Hospital, where they stood watching the fire (1546-1548).

George Greenberg, a parent, was waiting in the Youth Lounge for his son Ronald. He stood up and put on his coat about 5:10 P. M., expecting his son shortly. He had barely done so when a little boy ran past him saying there was a fire. Greenberg charged upstairs, but he was unable to get above the third floor. He came back downstairs for a flashlight and went outside to get one from his car. He saw firemen raising the aerial ladders, so he stuck around to help. He was even dragging hose for a few minutes. He couldn't find his son and, being told that some children were across the street in the hospital, he went to St. Joseph's. Not finding his son among the survivors, he phoned his wife who came to the hospital. While they were waiting, they walked over to a window to watch the fire. There they encountered the respondent whom Greenberg had noticed that afternoon in the Center. The respondent observed that it was a very large fire, and he said he had seen it between the third and fourth floors, and that he had gone up to the fourth floor and rescued two little girls. He also said that when he had tried to get back up he was blocked by the heavy smoke. Then the Greenbergs went in and identified the body of their little boy (1780-1784).

Zvi Almog, the Director of the Center, repeated the testimony that he gave at the Huntley hearing. There would be no value in setting down again here the intricacies and convolutions of that testimony, but, to go over again quickly its culmination, on January 24, 1966, Dr. Almog received a telephone call from the respondent pursuant to which he met him that evening (1588-1592). At that time, the respondent told Almog that after he and Andy Corsino separated on the fourth floor of the Center when the music

teacher told them to leave, he felt an urge to see a fire. Accordingly, he went to the paint cellar in the basement and got a three-quarters full, orange colored can and took the elevator to the third floor. He went to the fourth floor landing of the rear stairway and barricaded the hall doors so he wouldn't be interrupted. He then started to pour and splash the liquid in the can on the fourth floor stair landing, on the stairs and the walls, in the third floor corridor, and in the balcony just to the left of the balcony doors, and then set fire to it in the balcony with a match. It started as a small fire, but it rapidly grew and it frightened him, so he ran away and rejoined Andy Corsino (1594-1595).

The defense was based on two major theses. The first was that the fire was accidentally caused by an electrical malfunction. The second was that the respondent's psychological make up was such that he would offer a false confession to curry favor with his elders.

The first thesis was sought to be sustained on the testimony of three men, Dr. Gerald Oster, Joseph A. Butler, Jr., and David C. McGalliard. Dr. Oster was qualified as an expert on polymer chemistry (1809-1811). It's a vast oversimplification, but his testimony basically was contradictory of that of Mr. Brady with regard to Brady's laboratory analyses. Thus he stated that he had conducted tests with Acriseal, Polytoc and Acrylite. He described Acriseal as a water base latex emulsion containing plastic in suspension, and he stated that its principal commercial use was a sealant for raw concrete. He stated that it could not be ignited and would not burn except when dry, and then poorly (1812-1813, 1817).

Dr. Oster described Polytoc A. C. as an amber colored fluid which much resembles maple syrup. It will burn, but not readily, and in the doctor's judgment would be a poor substance with which to ignite a wood fire (1813-1814). It burns with a very black smoke (1817).

Dr. Oster described Acrylite as a trade name for a substance more commonly known as plexiglass. He stated that when warmed to 212 degrees Fahrenheit Acrylite changes chemically into a highly flammable substance which burns with a clean flame which, properly ventilated, releases carbon dioxide and water. At another point, he said, it produced carbon monoxide, though (1842). The Casbah pattern, because it is reticulated or bumpy, is more flammable than plain unreticulated Acrylite because there is more surface exposed per square inch (1814-1816).

The doctor described various tests he had made on these materials. He poured liquid Acriseal on a piece of vinyl tile and two hours later when it was thoroughly dry tried to ignite it with a spirit lamp. All he did was discolor the tile and the little residue this experiment produced was more characteristic of the tile than the liquid (1818-1821). He repeated the experiment with liquid Polytoc which, on application of the spirit lamp, ignited instantly. It displayed the peculiar characteristic, though, of bubbling a wall between the burning liquid and the unburned liquid which quickly extinguished the fire for want of fuel (1821-1825). He repeated the experiment once more, this time with dry Polytoc and this time the flame produced only one large bubble right where it was applied (1825-1829). Finally he repeated the wet Polytoc experiment, and he set fire to a piece of Acrylite for the jury (1829-1843).

The respondent asked Dr. Oster essentially the same hypothetical question that was put to Mr. Brady (2161-2167). He stated it to be his opinion that the fire began in the canvas and wood in the balcony near the wall adjacent to the dimmer room (Exhibit No. 3), and he located that spot by placing an "O" on Exhibit No. 3 (2168-2169). He said he came to that conclusion because the first smoke seen by the witnesses was white and characteristic of rags or canvas (2170). The fire, having once begun there, then set fire to the Acrylite with the resulting major conflagration (2175-2176).

On direct examination, it appeared that a copy of Mr. Brady's testimony had been given to Dr. Oster prior to his performing any of the experiments to which he testified (2161, 2184) and on cross-examination it was shown that these experiments were guided in large part by that testimony (2184-2185). It also appeared that much of the technical data on which he relied in making these tests was furnished to him by telephone by a man at Toch Brothers, the manufacturers of Polytoc and Acriseal, who identified himself as a chemist (2186-2193). Finally it was brought out that he conducted these experiments in a garage at his summer home, somewhat less than an ideal scientific climate (2192).

With regard to Dr. Oster's declaration that Acriseal was a water base which could not be made to burn, the prosecution produced a can of Acriseal-S, the existence of which he was unaware (2229-2231). Acriseal-S was shown to be a highly combustible substance, and the prosecution repeated the doctor's little Polytoc test using the Acriseal-S, which ignited and burned quite satisfactorily. It was subsequently demonstrated that Acriseal-S was the only Acriseal in the Center at the time of the fire (2597-2598; People's Exhibit No. 69A in Evidence, 2919).

Joseph A. Butler, Jr., a special agent of the Fraud and Arson Bureau of the American Insurance Association, was qualified as an expert in the investigation of fires (1865-1868). He visited the scene of the fire on December 21, 1965, and subsequently made two other trips there (1868-1869). Mr. Butler described his inspection, which was essentially a duplication of Mr. Brady's (1870-1873). His opinion of where the fire began was less restricted than Mr. Brady's, however, for he felt that it could have begun anywhere from the fourth floor stairwell, on the stairs, in the Guion Street corridor between the stairwell and the balcony doors or on the balcony proper (1875). He concurred with Brady, however, that an accelerant was used

and that the fire therefore was incendiary (1880, 1886). He concurred, too, with the electrical inspectors who ruled out electrical malfunction as the cause of the fire (1880-1881). Finally, when he became aware of the testimony of the two girls who had been in the third floor girls' bathroom at 4:55 P. M. to the effect that they had seen smoke on the balcony and not in the stairwell (1083, 1093), he modified his opinion to indicate that the fire began in the balcony (1885).

The final witness who supported the theory that this was an accidental fire was David C. McGalliard, a retired electrical engineer (1934). On the day he testified, he inspected the Center (1935), giving specific attention to the electrical system, and he described the two lighting systems in the building (1936-1937). He described a fuse as a device which is designed to blow out if the current in a circuit gets too high. He stated that if a circuit was overloaded for a brief enough period, a tenth of a second is the way he described it, the fuse would not necessarily respond to that overload by blowing (1937, 1946). In response to a question about temporary wiring, he said it could be very dangerous (1938) because if a temporary installation was hooked over a nail or something metallic, vibration could rub the insulation off the wire and short it, causing sparks to fly or molten metal to drop into combustible material (1940-1941). In response to a hypothetical question which assumed the accuracy of the testimony about the wiring, he stated that it would be possible for the fire to have begun by an electrical malfunction (1942-1943). He carefully avoided saying, however, that this was his opinion of how the fire in fact started.

The respondent then testified in his own behalf. He testified that he was eighteen years old and in tenth grade at Yonkers High School. He stated that on the day of the fire he and Andrew Corsino were working in the Youth Lounge. They spent the afternoon stacking chairs and

then later setting them up again when they found that they were still needed (1960-1961). When they finished their work, they went up to the fourth floor looking for a piano. They had just found one when a woman teacher asked them to leave (1961-1962). They left the room together, and the respondent said he was going to the bathroom. Corsino was going down to the first floor for candy. The respondent went down the rear stairway to the third floor to the men's room at the front of the building behind the front stairway (Exhibit No. 3). Leaving there, he walked down the front stairway to the kitchen on the second floor (Exhibit No. 2). He wanted a cigarette and he had no matches but he recalled seeing some in the kitchen earlier. While he was there, he heard a conversation from the street, so he walked to the window to listen. A girl came in, stayed briefly and left, and shortly thereafter so did he. He was on the way back up front to go down to see Corsino, but just as he got to the auditorium doors, Andy walked out of the elevator (1962-1963).

They decided to go to the gymnasium, so they walked through the auditorium and out the rear door of the auditorium opposite the rear door of the kitchen (Exhibit No. 2) and thence to the gym. On the way, Corsino asked for a cigarette which the respondent gave him, and he also gave him the matches he had just secured from the kitchen. He had taken the matches because his lighter was empty (1964). While they were sitting in the gym, a girl said she smelled smoke and after a minute so did the respondent. Finally Corsino smelled it, and they were on their way towards the back stairwell when a man came in and ordered everybody out. They waited a moment, then went up to the first floor, where Corsino left the appellant. He wanted to get his coat, so he went up to the second floor. Then he remembered there were children on the fourth floor, and he continued upwards. He was unable to get above the third floor, and on that floor he could flames coming out of the doors, especially what he thought was the

dimmer room door (Exhibit No. 3). He ran back down to the second floor but found it blocked by smoke (1965). He walked to the first floor and through the Youth Lounge, where he met Corsino, and the two of them walked over to the hospital. He flatly denied having started the fire that swept through the Center on December 20, 1965 (1966-1967).

On cross-examination he testified that he had left the Center on that evening without his coat, the contents of which were his wallet and cigarette lighter (1982). Some three weeks later, the coat was returned to him, but the wallet was gone and so was the lighter. Instead, in the pockets were two steak knives, a couple of pot holders, and four boxes of matches. The matches had a special significance. The single book of matches the respondent took from the kitchen, and the only one there, had a playing card on the top of the box. It was also noted by Corsino (1544). But the four boxes of matches later found in his coat were the identical type, all four boxes, rather than books of matches, and all four with the playing cards.

One other discrepancy showed up in the respondent's account of his activities. When he retreated from the third floor to the second floor and opened the double stairway doors he, as he put it, "got a face full of smoke" (1965). Smoke or no smoke, though, he entered that corridor on the second floor and walked down it some sixteen feet to the auditorium doors or, as he insisted, doorway. He never entered the auditorium, but nevertheless he claims he was hit *in the thumb* by a piece of flaming debris that fell from inside the auditorium. When pressed on the point, he suggested that it may have dropped from the balcony through one of the duct openings. On the surface, that's a credible explanation, but if one takes Exhibits Nos. 2 and 3 and, either by superimposition or measurement, plots where the auditorium doors are with regard to where the duct holes are, it becomes instantly apparent that there *are* no duct holes over the door or even near it (2010-2018).

Even if you can get past that improbability, we are faced with yet another. The respondent testified that he entered the second floor corridor because of smoke and heat that was rolling down the stairs behind him from the third floor. Yet when he finished his inspection of the auditorium, where did he go? Why, right back to the rear stairway and into the very smoke and heat, certainly more intense now, that he had just fled from (2021-2022).

The second facet of the respondent's defense was presented by a procession of teachers and social workers, a psychologist and three psychiatrists. They attempted to show the jury that the respondent was "suggestive" or, in other words, that he was apt to confess falsely in the hope of winning the approval of the adults with whom he came into contact.

Herbert Cohen, the Assistant Principal at the Hawthorne Cedar Knolls School, said that the institution is a residential treatment center for the treatment of emotionally disturbed children (2070) and that the respondent was proposed for admission to the school in October, 1963 (2072). Cohen interviewed the respondent, accepted the referral, and enrolled him at the school in February, 1964, where he remained until June, 1965 (2074). In that period, he spoke to the respondent on an average of twice a week (2075). Mr. Cohen stated that in his contacts with the respondent he found that the respondent got along poorly with boys his own age, but on the other hand that he got on very well with adults and was continually courting their attention and their favor (2137-2140).

Howard Menzer stated that during the period that the respondent was at Hawthorne Cedar Knolls he was his cottage father. This consists of doing for these residents of the cottage the same things that would normally be done by the child's natural father in a regular home environment. Menzer too found that the respondent sought out the attention of adults to the exclusion of the other boys, and

he also stated that the respondent would now and again admit to things that he had not done (2277-2281). Neither Mr. Cohen nor Mr. Menzer ever made any written reports of these observations to any of the resident psychiatrists (2144, 2282).

Herbert J. Friedman, an Administrator at the Linden Hill School in Hawthorne, New York, was the respondent's teacher at Hawthorne Cedar Knolls from February to June of 1964 (2282-2289). When the respondent first entered Mr. Friedman's class, there had been an initial report prepared on him. This report indicated that the respondent "would be a stabilizing influence" in the group (2290), and ultimately that forecast was borne out. The respondent was well dressed and an average student (2290-2291). Friedman also felt that the respondent preferred the attention of adults to associations with children and pointed out that he had observed this deportment both with regard to himself and with regard to a practice teacher (2291-2292).

He also stated that the respondent would admit to doing things he had not done. He gave two examples. The first was an incident with a pen. Another boy in the class was missing a pen and the respondent admitted taking it. Later it was discovered in the owner's desk. Now and again he would say he had not done his homework and then would bring it in the next day (2292-2293), but, as was pointed out on cross-examination, the fact that a person hands in work on Tuesday is not enough to sustain a belief that he also had it on Monday (2300-2302).

Mrs. Dorothy Limbert was the respondent's social worker for about fourteen months at Hawthorne Cedar Knolls (2326-2327). Her function was to show him that his being away from his own home was not his fault and to prepare him for his ultimate return home (2335). She asked him about the fountain pen incident related by Mr. Friedman and in her opinion he would feel generally blameworthy for everything because of his feeling that his sepa-

ration from home was his fault (2336). She ascribed the same motivation to his false confession at the cottage related by Mr. Menzer (2339).

Dr. Frederick M. Evans was a staff psychiatrist at Hawthorne Cedar Knolls and examined the respondent on October 9, 1963 (2343-2345). The examination took just under an hour (2347). The doctor concluded from this interview that the respondent had a behavior problem. He would, out of resentment, begin to do something unacceptable and then recoil from it and do something else, still unacceptable, but less so. The doctor's prognosis for the respondent's condition was good, and he felt that the respondent could be helped by the school. Subsequent to the respondent's admission to the school, the doctor's contact with him was minimal, because he was only called upon if a child were in trouble, and the respondent was never in trouble and never displayed any aberrant behavior (2345-2347). Asked by the Court if the respondent could distinguish right from wrong, the doctor said that in his judgment he could, both before and after an impulsive act, and be able to talk about it freely, but that while the act was occurring he probably would not (2354-2356).

Dr. Tatania Juzak was Chief Clinical Psychologist at Grasslands Hospital, and she examined the respondent on January 31, 1966 (2358-2359). She administered to him a series of approved psychological tests (2359-2360). She concluded therefrom that he was of average intelligence, although he performed on a somewhat lower than average scale. He displayed a lot of intellectual instability, and she characterized him as an emotionally unstable person, highly immature, but very egocentrically oriented. He knew, in her opinion, right from wrong but would, if possible, shirk any responsibilty to conform to these standards. She described him as diffusely aggressive and said that he would utilize these aggressive tendencies to serve his great desire to be taken care of, to gratify a great sense of dependence (2360-2361). Dr. Juzak emphasized that the

aggressive tendencies described by her were tendencies of thought, not of action, and that such a person as she described the respondent as being would have aggressive thoughts but might not translate them into action. She firmly denied, however, that this indicated to her that such an individual was amenable to suggestion from an outside source (2362-2363).

Dr. Fred V. Rockwell, the Director of Psychiatry of Grasslands Hospital, examined the respondent in late January or early February, 1966, as a neglected child on order of the Family Court (2396-2398). The doctor read the respondent's personal and family history into the record, and, since anything we might say of it here would have to be an abbreviation, we would simply refer the Court to pages 2400 to 2403 of the trial record. He stated that from this history and his examination, he was of the opinion that the respondent showed no evidence of mental disease (2403). He was asked a hypothetical question based on all the facts in evidence about the fire and was then asked if he believed that such a person as he had observed the respondent to be would falsely confess having started such a fire (2432-2436). The doctor's answer was that in such a situation he would find a false confession "... incredible ... under any circumstances that I can conceive of" (2437).

Dr. Sol Nichtern, a child psychiatrist, examined the respondent during the trial of this case on May 13, 1967. He described himself as particularly qualified in the area of arson and firesetting, as he had examined dozens of children accused of those crimes (2440-2443). The doctor's basic diagnosis was that the respondent had an inadequate personality designated by the American Psychiatric Association as Code No. 000X41. He found that the respondent sometimes had difficulty in distinguishing what was real and what was unreal, and this in Dr. Nichtern's judgment represented an inability to cope with things around him.

He found the respondent's fantasies concretely oriented (2346-2350).

Dr. Nichtern described the psychiatric pattern of the representative fire setter. He is generally subject to impulse disorder, a fantasy life in which he is omnipotent and has a hostility towards the world. The doctor did not find any of these characteristics present in the respondent (2451-2452). He found characteristics present which he diagnosed as immaturity, inadequacy, and suggestibility (2454). In response to a hypothetical question which embraced all the prior psychiatric and psychological evidence, that of the teachers and the social worker, the personal and family history of the appellant, and Dr. Nichtern's own examination and diagnosis (2456-2466), he stated there was little evidence to substantiate the concept that the respondent was a firesetter, as the doctor knew them (2467). In answer to a further hypothetical question which embraced all the testimony having to do with the fire (2474-2482), the doctor stated that it was not incredible to him that the respondent might have confessed falsely (2489-2491).

On cross-examination, it appeared for the first time that Dr. Nichtern had had fully read to him every scrap of psychiatric and psychological testimony of the trial and had examined Dr. Juzak's raw data and the Grasslands Hospital report (2495-2505). This gave rise to a serious question of whether or not the doctor's answer to the first hypothetical question was in fact responsive to the question or whether it stemmed from his possession of this unauthorized information. The assistant district attorney moved to strike his entire testimony, but the motion was denied (2504).

The doctor also stated under cross-examination the three criteria he looked for in a firesetter applied to pathological firesetting; and he agreed there were other kinds of firesetters, e.g., would-be heroes, to whom these criteria need not in every case apply (2551-2553).

Following that conviction the respondent appealed to the New York Supreme Court, Appellate Division, Second Judicial Department, which Court unanimously affirmed the conviction without opinion. He then carried the appeal to the New York Court of Appeals, which Court unanimously reversed the conviction and remanded the case to the County Court of Westchester County for a new trial with a strong suggestion, if not directive, that a new hearing be held as to the voluntariness of the respondent's admissions to Almog. It also directed the release to the respondent of his recorded confessions to the police (cf. Exhibit "A").

At the hearing, which was had pursuant to that opinion, the County Court, Honorable George Beisheim, Jr., J., as a first order of business directed the playing in open court of the tape-recorded police confessions. The prosecution then produced as witnesses two police officers and Dr. Almog who recounted the details of their various conversations with the respondent, and at that point the People rested. At the conclusion of the People's case, the respondent moved to suppress the Almog admissions, and the Court reserved decision. Thereafter, in an opinion dated September 11, 1970 (cf. Exhibit "G"), the Court granted the motion and suppressed the admissions. It did so, however, less by reason of its own impression of the evidence on the hearing than by reason of what it deemed to be

> "the 'quasi-finding' or at least a strong indicative guideline by the Court of Appeals that the Almog confession was tainted by the admissions and confessions previously made to the police"

Opinion of Beisheim, J., dated September 11, 1970.

The People appealed this order to the New York Supreme Court, Appellate Division, Second Judicial Department and as an adjunct to that appeal appended the

affidavit of an Assistant District Attorney required by the New York Code of Criminal Procedure, § 518-a, which, in effect, stated that the Court's ruling had deprived the State of such evidence as made what remained insufficient to convict the respondent. Thereafter, the respondent moved to dismiss the indictment, and over the People's opposition the Court granted that motion without opinion. The People then appealed that order as well.

In the Appellate Division three of the five Justices of the Court modified the order of the County Court as to the suppression and, as so modified, affirmed it (cf. Exhibit "F"). Essentially the modification effectuated the restoration of the admissibility of two of the four Almog admissions, those of December 22, 1965 and January 24, 1966. The latter, as the Court will have noted, is the final, critical and fully incriminating statement to Almog. The same three Justices reversed the order dismissing the indictment and reinstated the indictment. A fourth Justice would have affirmed the orders without modification, and a fifth would have reversed them on the thesis that the County Court had misapprehended the opinion of the Court of Appeals and was not bound by it to find taint in the Almog statements. The People appealed to the Court of Appeals from that portion of the order of the Appellate Division which affirmed the County Court, and the respondent appealed from that portion which modified the suppression order and from the reversal of the indictment order.

The Court of Appeals reversed the order of the Appellate Division and reinstated the orders of the County Court (cf. Exhibit "E"), and on June 11, 1971, by order of the County Court of Westchester County, Honorable George D. Burchell, J., dated the same day the respondent was released from all custody and restraint.

POINT I

The respondent's admissions to Dr. Almog were not so tainted as to require their exclusion as evidence.

Probably it might be as well right at the beginning to attempt to clarify the role of Almog vis-a-vis the police, because if he was a police agent, then under New York law, *People* v. *Robinson,* 13 NY 2d 296, as well as Federal law, *Massiah* v. *United States,* 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199, any admissions made to him by the respondent would be clearly inadmissible. If we may establish one further ground rule, we would submit to the Court, as the New York Court of Appeals itself held, that:

> "It is well settled that the power to act and bind a principal comes from the acts of the principal and not from his agent." *Kuhn* v. *City of New York,* 274 N.Y. 118, 134

This is an expression of the law to which the Federal courts also subscribe:

> "But it seems clear to me, and I so hold, that a man may not make himself the agent of another merely by calling himself one, when in fact he is an independent contractor." *Kirkland* v. *Sapphire International Towing, Ltd.,* 262 F. Supp. 309, 314 (S.D.N.Y.)

We proceed, then, on the proposition that for Almog to be described as a police agent, that agency could only derive from some delegation of authority to him by a police official. By that standard it is unmistakable that Almog was not a police agent by any definition of that term, because rather than receive authority to act from the police, Almog was abruptly told that the investigation was police business and that he would be well advised to tend to his own and stay out of theirs (179-182). It must

always be remembered that Almog was conducting his own investigation for his own purposes, that of making his report to the Center's Board of Governors. Inevitably his investigation crossed the trail of that of the police, but to suggest that he thereby became their agent is fanciful. At his suggestion a bogus meeting of the Board of Directors was held, and at his suggestion a detective was assigned to the Center, but this was fairly prosaic police work. However, one is almost compelled to conclude that instead of the police bending Almog to their purposes he was bending them to his. This was a classic case of the tail wagging, or at least trying to wag, the dog.

If the Court is persuaded, and it is submitted that such a persuasion is difficult to avoid, that Almog was not a police agent, one may ask what the relationship was between them and him which tainted the confessions to him. The citation by the Court of Appeals of *Wong Sun* v. *United States,* 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407, and *Clewis* v. *Texas,* 386 U.S. 707, 18 L. Ed. 2d 423, 87 S. Ct. 1338, suggests that the link was one of time. Was there a sufficient lapse of time between what the Court of Appeals seems to have found to be an invalid police confession and the spontaneous statement to Almog to "dissipate the taint?" The Court apparently thought there was not.

There is something basically distasteful about the unadorned expression, "These cases are distinguishable" because so frequently the distinction is the most frivolous sort of thing. The distinction here, though, is a profound one. In both *Wong Sun* and *Clewis* the defendant was never out of police custody in the interval between the time the taint attached and the time the admission was made. In *Wong Sun* the defendant Toy's apartment was entered, unlawfully, the Court held, and almost immediately Toy made an incriminating statement. In *Clewis* a third statement the defendant made was said to be tainted

by two impermissibly secured prior confessions, but from first to last Clewis had

> "little contact except with policemen."
>
> *Clewis* v. *Texas, supra,* 386 U.S. at 710,

and had been hauled from one jail to another. Clearly in these cases the police were seeking to profit from their own misconduct. By contrast, in the present case the police sought no advantage over the respondent. They had, as a matter of fact, released him, and, more than that, they had released him to the very person whom he had selected for that purpose and who was standing by at his request. Dr. Almog was the man in whom he had the greatest of confidence. That this confidence was misplaced is altogether unimportant because to examine this question properly we have to see Almog through the respondent's eyes. To equate Almog, then, whom he regarded as his friend, with the police, whom he had to regard as the enemy, and to conclude that the character of the police interview remained unchanged throughout his quiet, self-sought conversation with Almog is unrealistic. This point of view is further buttressed when the respondent's prior experiences with the police are considered. He had already given a minimum of two inculpatory statements to the police, and on each occasion of his having done so he had walked right out of headquarters and gone home. The third time was largely indistinguishable from the first two, and as far as he was concerned whatever troubles he had been afflicted with in headquarters stayed there behind him because he had been through this whole routine twice before.

There's another facet of this question which may profitably be examined. It is the petitioner's firm conviction that the New York Court of Appeals has unwarrantedly broadened the scope of this Court's holding in

Johnson v. *New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772. Just to isolate and thus better to define this problem, let's assume that the police interrogated the respondent without giving him all of the warnings to which he was entitled under *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 89 S. Ct. 1602. Although we have already expressed ourselves on the point, let's also assume that this irregularity carried over to and had some cause and effect relationship upon the Almog statement. On January 24, 1966, when the police interrogated the respondent, that interrogation was perfectly legal and proper. To put it differently, the statement the police secured at that time was not tainted in any particular and was properly admissible. To apply the old geometric theorem that things equal to the same thing are equal to each other, it therefore follows that the respondent's statement to Almog was proper and admissible because there was no taint to the police statement to be transferred to the one to Almog. All right, having come this far we stop and take stock. We have, then, two perfectly valid confessions, one to the police and one to Almog, and along comes *Miranda* v. *Arizona, supra.* Now there is some doubt of the continued validity of the police confession because we have assumed that the respondent didn't get all his *Miranda* warnings. That doubt was resolved a week later by *Johnson* v. *New Jersey, supra,* which said that *Miranda* governed all trials begun after June 13, 1966. The trouble with eliminating the Almog confession under the *Johnson* rule is that *Miranda* addressed itself solely to statements given to law enforcement officers.

> "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated *by law*

> *enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona, supra,* 384 U.S. at 444. Emphasis added.

If it be the fact that by operation of the *Miranda* rule the statement to the police, which was theretofore untainted, acquired a taint, that may be a sound and logical conclusion, because *Miranda* is directed at the police. That hardly accounts, though, for the theory that the Almog statement, similarly untainted up to that point, should share the newly acquired *Miranda* taint because Almog wasn't a police officer, and logically the *Miranda* decision has no application to him or to the statement he received.

POINT II

The respondent's statements to the police were improperly suppressed as evidence.

It will be recalled that shortly following the respondent's indictment on these charges he moved to inspect the minutes of the Grand Jury or in the alternative for the dismissal of the indictment. By its decision dated October 21, 1966 (cf. Exhibit "B"), the County Court (1) held inadmissible all the statements the respondent had made to the police and (2) reserved decision as to the balance of the motion and directed a hearing, the purpose of which was to establish whether or not Dr. Almog was a police agent. It is submitted that, at least as to its suppression of the police confessions, the Court was in error.

In the first place, it is submitted, the Court ruled in far too precipitous a manner, because under New York law an indictment is presumed to be founded upon legal and sufficient evidence (*People* v. *Bergerson*, 17 N.Y. 2d 398). The Court entirely disregarded this presumption and indeed may even be fairly said to have adopted a contrary

presumption. What is important to remember here is that the confessions were secured before *Miranda* was announced, in December of 1965 and January of 1966. As important or even more so, the case was presented to the Grand Jury and the indictment voted and handed up prior to *Miranda,* in April and May of 1966. Consequently it would be highly unusual to find in the minutes of the Grand Jury that the police had complied with *Miranda* inasmuch as there was no *Miranda* to comply with. There is no warrant for assuming, in other words, that *Miranda* was not followed simply by reason of the lack of affirmative evidence in the Grand Jury minutes that it was. That, though, is exactly what the County Court did. It noted:

> ". . . the record on which the District Attorney relies *fails to reveal* that they (the recorded statements) were obtained in compliance with the rules of the Miranda case."
>
> Decision of October 21, 1966 (Exhibit "B"), p. 2; emphasis and parenthetical explanation added.

Clearly the People were entitled to the hearing contemplated by the New York Code of Criminal Procedure, § 813-g, and which we had only to request (*People* v. *McCoy,* 21 N.Y. 2d 730). It is submitted that the Court's decision was an ill-considered, overly abrupt reaction to the *Miranda* ruling before the full scope and range of *Miranda* were appreciated.

Moreover, on such a hearing as this there is a considerable likelihood that the People would have been able to establish the voluntariness of the police confessions. We will begin by agreeing that it is highly improbable that the *Miranda* warnings, particularly the fourth, were given, but that gives rise to the question of whether or not they had to be.

It is the position of the People and the only position upon which a success for the People with respect to the

issue of the police confessions would as a practical matter justify a reversal here that, upon the entire record of the proceedings thus far *as a matter of law* the confessions to the police were not illegally obtained *either*, because of the acknowledged failure to give *Miranda* warnings because no such warnings were required *or* because of any actual involuntariness appearing in the actual transcriptions of the police interviews.

The respondent was interviewed extensively by the police on December 22, 1965. Indeed, an examination of the record by volume indicates that the better part of all of the tape recorded conversations relate to December 22. It is respectfully submitted that in evaluating the evidence of December 22, 1965, this Court should bear in mind what must have been the traumatic impact upon the entire City of Yonkers of this awesome tragedy. While the police interviewed Ruppert extensively, they were also interviewing innumerable other people in police headquarters in a round-the-clock attempt to put the pieces back together and determine what in fact had happened. The police were not so much seeking a defendant at this stage as they were seeking an understanding as to why the deaths occurred. Certainly, the investigation was still open, and Ruppert was not an exclusive target or suspect. He certainly was not in custody, nor could he have believed he was in custody because of the fact that he was one of a large number of people being interviewed at police headquarters and indeed, the record indicates that he had to wait some time before his turn came.

On the other hand, it is true that the interrogation of Ruppert on December 22 was extensive to the point of being possibly oppressive and if a confession had been obtained in this circumstance, it may well have been arguably involuntary. However, what may have been true of the interview of December 22 does not necessarily apply to the subsequent interviews and never again in the entire

course of these proceedings did the police interrogation reach the intensity of the initial and unsuccessful interrogation on December 22. Several important things did happen, however. By virtue of the fact that Ruppert was released and not held in custody after his interview of December 22, he had reasonable grounds to expect that subsequent interviews were merely that and not preludes to incarceration, which it is respectfully submitted is a significant subjective factor in evaluating all of the circumstances here. It follows from this that if in subsequent interviews the defendant was neither in custody nor under any reasonable belief that he was in custody and subject to any coercive influence resulting from custody, the warnings required by *Miranda* v. *Arizona, supra,* were not absolutely necessary.

It must be pointed out that the next time Ruppert was questioned in the police headquarters by persons known to him to be police officers was January 19, 1966, one month later. It is his subjective awareness of what happened to him and not the continuity of the investigation in the interim, unknown to him, that indicates whether any coercive impact from the first interview carried to the second. Five days later on January 24, 1966, the defendant was again interviewed for the third and last time in police headquarters. In the interim, between the first and second interviews on December 22 and January 19, respectively, several events occurred, but with respect to only one of them was there a subjective awareness of police involvement by Ruppert. On December 28, 1965, Ruppert toured the burnt out building with the police and made admissions that he flipped a cigarette which might have accidentally started the fire. The other occurrences that followed did not have observable police involvement. On January 5, 1966, an undercover police officer was assigned to work with Ruppert at the Jewish Community Center, but no further information was obtained from this source. During this period Ruppert had conversations with Almog about

the fire. On January 14, 1966, a "bogus board of directors meeting" was set up with police officers representing themselves to be members of the board of directors of the Jewish Community Center. It is significant to note that this fact was unknown to Ruppert, and he certainly could not have been subject to the coercive influence of in-custody interrogation. Further, it is difficult to see what impact this session could have had on subsequent police interviews insofar as Ruppert never knew that the police were privy to the discussions there held. Finally, on January 19, 1966, virtually a full month from his last station house interrogation, Ruppert was again questioned by the police and, apparently, he virtually immediately admitted a greater degree of responsibility than he had theretofore acknowledged without any undue pressure being applied to him. (It of course follows from the discussion previous that Ruppert was not in custody, he knew he was not in custody, and no *Miranda* warnings were necessary.) He admitted kicking over a bucket of burning material.

It is significant to note at this point that Ruppert's initial reluctance to discuss the true events of the fire with the police, appears not to have been motivated by the desire to be secretive with respect to the police, but by an almost unnatural fear of his father (Hearing Record at 545 and 549). The same concern is acknowledged by the defendant in the interview of January 19, 1966 (Hearing Record 713), and this indicates that any apparent resistance was not a disinclination to tell the police the truth as much as a concern that his father would discover it. Ruppert is also concerned with what Almog would think of him (Hearing Record 721), thereby indicating a stronger concern about his relationship with Almog than his relationship with the police. Finally, however, on the same page Ruppert eliminates any question as to whether his statements of January 19, 1966 were voluntary when he acknowledges that even before the first question was put to him on that date or the first police officer requested that he submit to

an interview he was affirmatively desirous of the opportunity of such an interview to correct (even if in part) the erroneous information he had given. He says:

> "I was hoping you guys would pick me up again cause I was thinking if I kept it to myself for the rest of my life (inaudible), I might start another fire."

Further on, he indicates again (Hearing Record 721) his concern about his father. Having acknowledged responsibility for the fire he says "I betcha my father's certainly going to be mad."

On January 24, 1966, again the defendant appears to be willing to go the rest of the way with virtually no reluctance and tell, finally, the actual story of how he started the fire. It is significant to know at this point that neither Almog nor the police had ever met or conversed with the principal forensic chemist used by the People. This was because he had not even been retained at that time (R 1461). The initial fire investigator, based upon the facts then available to him, did not place the origin of the fire at the exact point where Ruppert said it was (although at trial when called by the defendant as a witness and faced with a hypothetical question, including facts provided by other witnesses previously unknown to him, that fire expert acknowledged that the origin of the fire was at the same point where the People's forensic chemist located it and which is the point where Ruppert said he started it. See R 1865-1907). While the truthfulness of a police confession is no longer proof of its voluntariness, at least it is significant that the police could not have suggested to Ruppert in interrogation the story of where the fire started because they did not know.

It is respectfully submitted that, although at times the police interviews were extensive, they were precisely that, interviews, and that the transcriptions make it perfectly clear that the defendant, while at times he may have viewed

himself as detained for a few minutes for the purpose of questioning, was never under any belief other than that he would be free to leave at the conclusion of each such interview and during the entire time he resided at home and, apart from the interviews, proceeded upon his ordinary affairs. His compulsion to confess was a compulsion of conscience, and not of external coercion.

We would also suggest to the Court respectfully that this may be the case and this may be the time to re-evaluate *Johnson* v. *New Jersey, supra.*

In *Johnson,* the Court discussed the reasons why *Miranda* should have only prospective effect and pointed out:

> "Nor would retroactive application have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed. We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. See, Haynes v. Washington, supra; Spano v. New York, supra. Prior to Escobedo and Miranda, however, we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. See Crooker v. California, 357 U. S. 433, 2 L. ed. 2d 1448, 78 S. Ct. 1287 (1958); Cicenia v. Lagay, 357 U. S. 504, 2 L. ed. 2d 1523, 78 S. Ct. 1297 (1958). Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding Escobedo and Miranda." *Johnson* v. *New Jersey, supra,* 384 U. S. at 731, 16 L. ed. 2d at 891.

The Court concluded therefrom:

> "Future defendants will benefit fully from our new standards governing in-custody interrogation, while

past defendants may still avail themselves of the voluntariness test." *Johnson* v. *New Jersey, supra,* 384 U. S. at 732, 16 L. ed. 2d 892.

However, what the Court may have overlooked were the cases of *present* defendants, those from whom confessions were taken before *Miranda* was announced and who came to trial after *Miranda.* The Court, discussing the new *Miranda* rule, said:

> "Law enforcement officers and trial courts will have fair notice that statements *taken* in violation of these standards may not be used against an accused." *Johnson* v. *New Jersey, supra,* 384 U. S. 732, 16 L. ed. 2d 892; Emphasis added.

But as to those whom we have called present defendants, law enforcement officers did not have fair notice of the new standards, but they were nevertheless being held to them. They had fair notice that they should *take* no more such statements, but, regrettably, no provision was made by the Court for the use of statements taken by law enforcement officers in good faith prior to *Miranda* and in full conformity with the law on which the Court concluded they had fairly relied, in cases which had not yet come to trial.

Since *Johnson,* the Court has decided *Stovall* v. *Denno,* 388 U. S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967, and *Desist* v. *United States,* 394 U. S. 244, 22 L. ed. 2d 248, 89 S. Ct. 1030, and in each of these has established as the cut-off date the date the prohibited conduct was done. If *Johnson* had adopted the same standard, which the Court has since suggested may be a better one, *Jenkins* v. *Delaware,* 395 U. S. 213, 219 n. 7, 23 L. ed. 2d 253, 259, 89 S. Ct. 1677, 1680, then this present statement would have retained its initial validity, and there would be no need to inquire into the use to which it might properly have been put.

CONCLUSION

For the reasons set forth herein the petition for certiorari should be granted.

Respectfully submitted,

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August 18, 1971

Exhibit "A"

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THOMAS

GIBSON, J. On December 20, 1965, the defendant, a boy 16 years old, with a history of minor mental disturbance, was employed in the Jewish Community Center in Yonkers; and on that day there occurred in the center a fire that took 12 lives. Defendant has been convicted of arson causing the fire and of the murder of those whose deaths ensued.

The central issue concerns a confession which defendant gave to Zvi Almog, the director of the center. Other admissions and a confession given the police were summarily suppressed as violative of the *Miranda* rules[1]; this as the result of the pretrial hearing of a motion addressed to the Grand Jury minutes and to the indictment. The suppression was predicated upon the court's review of the Grand Jury minutes and neither then nor thereafter was defendant permitted to inspect these confessions taken by the police. There followed a *Huntley* hearing, concerned solely with the Almog confession, which the hearing court found "voluntary and not psychologically coerced".

The repeated denials of defendant's applications to inspect the police confessions constituted serious error, requiring reversal of the judgment and a new trial; the denials depriving defendant of an opportunity to demonstrate that the activities and procedures of Almog and the police leading to the procurement of the separate confessions were so closely, if not, indeed, inextricably interrelated as to taint the Almog confession with the conceded defects of the police confessions from which the Almog confession seems to have flowed. The sequence of events strongly suggests a close

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[1] *Miranda* v. *Arizona* (384 U. S. 436) was decided soon after defendant's indictment.

liaison between the the inquisitors and may be outlined as follows:

December 20, 1965—The fire.

December 22, 1965—Almog reported to the police that defendant said that "everytime there is a fire he has been accused of it."[2]

December 29, 1965—Defendant was questioned by police and made inculpatory statements concerning his "flicking" of cigarettes around the center. Defendant told this to Almog also, *after* he had told the police. Almog urged an arrest.

January 5, 1966—Almog requested that the police install recording equipment at the center as he wanted to question defendant. The police refused, apparently because, as a result of the fire, there was no suitable electric outlet. At any rate, Almog secured a policeman to work incognito with defendant at the center. Five days of this produced no inculpatory statements which the policeman could report.

January 13, 1966—Almog suggested to the police that they set up a bogus board of directors meeting where he and policemen posing as the center's

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[2] This might be found to be the only admission made to Almog which could be considered free from taint, as on this date, and because of this inculpatory statement, Almog requested the police to concentrate their investigation on defendant.

Exhibit "A".

board members could interrogate defendant. Almog felt he could arouse the boy's sympathy if he felt that Almog might lose his job because of the fire.

January 14, 1966—The very next day, this "meeting" was held. Defendant admitted he had thrown cigarettes into a pail and had seen flames. After defendant's departure, Almog again urged an immediate arrest.

January 19, 1966—Defendant was observed by Almog in a police car. That night, apparently because of defendant's disclosure of new information to the police, detectives asked Almog to come to the center and look for certain five-gallon cans, which Almog did find.

January 24, 1966—In the afternoon, Almog sent for defendant and had a conversation with him which was recorded. In this conversation defendant told Almog that he had kicked the flaming bucket down some stairs in the center and that he had *already* related this to the police.

That evening defendant finally made a complete confession to the police and *then* called Almog from the police station. Almog went there, waited a few minutes and then encountered defendant who said he had made a full confession.

It seems either inexplicably strange

Exhibit "A".

> or of great significance that after defendant had, in effect, confessed to 12 murders, the police released him to Almog who drove him home. At this time defendant told Almog what he said he had told the police —that on December 20 he had an urge to set a fire; that he left a coworker and went to the paint closet in the basement where he found a can marked "highly flammable"; that he took the can in the elevator to the third floor, went to the rear stairwell, ascended to the fourth floor and stacked chairs against an entrance door; that he then poured the contents of the can over objects in the stairwell, and also over other materials in the third floor balcony; that after the contents of the can had been disposed of he lit a match whereupon a "very big" fire erupted.

It may be noted at this point that defendant testified at the trial and repudiated the alleged confessions.

Throughout the 33-day chain of interrogation, above outlined, the only admission Almog received in the first instance was the initial statement on December 22 that defendant said he was always accused of setting fires. From that time on, all inculpatory statements given to Almog had been first given to the police, or to the police and Almog jointly. Thus, what Almog was receiving were rehashes of what the police had already illegally obtained. All during this period it is clear that Almog, if not an agent of the police in that he was directed by them (see *People* v. *Leyra,* 302 N. Y. 353), and this we do not decide,

was at least in close collaboration with them, and it is also evident that the information illegally taken by the police was directly connected in each instance to information taken by Almog.

This, clearly, is not a case where a private citizen receives an original confession and then conveys it to the police; nor is it one where a later confession is untainted because of the lapse of time and pressure (see *United States* v. *Bayer*, 331 U. S. 532, 540).

Thus, the basic issue remains whether the statements given Almog were tainted because they had already been given to the police. The test seems to be best stated in *Wong Sun* v. *United States* (371 U. S. 471, 488): "[T]he more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

Significant, also, is the language in *Clewis* v. *Texas* (386 U. S. 707, 710): "On this record, we cannot hold that petitioner's third statement was voluntary. It plainly cannot, on these facts, be separated from the circumstances surrounding the two earlier 'confessions.' There is here no break in the stream of events from the time Sunday morning when petitioner was taken to the police station to the time Tuesday morning some nine days later that he signed the statement in issue, sufficient to insulate the statement from the effect of all that went before." In *Clewis*, too, it was remarked in a footnote, and by way of dictum: "This Court has suggested that in some circumstances it may be a denial of due process for a defendant to be refused any discovery of his statements to the police. *Cicenia* v. *Lagay*, 357 U. S. 504, 510-511 (1958); *Leland* v. *Oregon*, 343 U. S. 790, 801-802 (1952). In light of our disposition of this case, however, we need not reach this question." (p. 712, n. 8).

Exhibit "A".

We need not consider, however, whether, in every case, the defendant's statements must, on demand, be produced for his inspection if they are not to be proven by the prosecution.[3] In this case, disclosure is required because the evidence presented the clear probability that the Almog confession flowed naturally, perhaps inexorably, and in point of time immediately, from the police confession; and thus, it might be found, from police questioning and other police activities of one kind or another, pursued with Almog's participation or close co-operation; with the result that the Almog confession might, upon full development of the record, be found to be the product of the same police interrogation and investigation that the hearing court, in the context of the police confessions, has already found illegal.

We need not pass on appellant's additional assignments of error. Those of seeming substantiality are not such as to recur. The reversal and direction for a new trial which we find necessary, will, of course, permit a further *Huntley* hearing with respect to the Almog confession and thereupon and in the light of the evidence there produced, defendant can again move to inspect the Grand Jury minutes and to dismiss the indictment.

The judgment of the Appellate Division should be reversed and a new trial ordered.

Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, BREITEL and JASEN concur.

Judgment reversed, etc.

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[3] The prosecution also successfully resisted the pretrial production of police reports and memoranda as premature, contending that under *People* v. *Rosario* (9 N Y 2d 286, cert. den. 368 U. S. 866) the prior statement of a witness is to be made available for purposes of cross-examination only; and, the police confessions having been suppressed, the officers concerned with them were not called as witnesses.

Exhibit "B"

COUNTY COURT

WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

against

THOMAS ALFRED RUPPERT,

Defendant.

DEMPSEY, J.

Defendant moves this Court for an order granting him inspection and production of the Grand Jury Minutes, or in the alternative, an order dismissing the indictment against him.

On December 20, 1965 a fire, with attendant heavy smoke, in the Jewish Community Center in Yonkers, New York, snuffed out the lives of 12 persons; 9 children and 3 adults. From this tragedy stems the indictment. On May 19, 1966 this seventeen year old defendant was indicted for Murder in the First Degree (feloniously committing Arson in the First Degree in the night time, resulting in death) and Arson in the First Degree.

The Court reviewed the many pages of testimony, the exhibits and listened to the many hours of tape recordings containing statements of defendant. All of these constituted the basis for said indictment. At the time the indictment was handed down, it was valid and legally sufficient. (§ 251 Code of Criminal Procedure) Exploration as to the voluntariness of the admissions were at that time provided to defendant by the procedures outlined

Exhibit "B"

in § 813 (f) et seq. Code of Criminal Procedure; Jackson v. Denno (378 U.S. 368); People v. Huntley (15 N.Y.2d 72).

Subsequent to the voting of the indictment, the Supreme Court of the United States rendered its now famous decision in Miranda v. State of Arizona (86 S.Ct. 1602). This was followed by an equally positive assertion as to the applicable date of Miranda; to wit, June 13, 1966. (Johnson v. State of New Jersey, 86 S. Ct. 1772) Although that case states that the rules in the Miranda case apply only "to cases in which the trial began after the date of our decision one week ago", our State Courts have rightfully included indictments within the limits to be proscribed by this constitutional requirement. (People v. Chalfa, 50 Misc.2d 845; People v. Allen, 50 Misc.2d 897) As to the recordings taken by the police and heard by the Court and utilized by the Grand Jury in arriving at the indictment, the record upon which the District Attorney relies fails to reveal that they were obtained in compliance with the rules of the Miranda case. Although, it was impossible at the time these were obtained and used, to anticipate the postulates of our highest court, they are obviously affected thereby. This Court, obligated to administer the law as so announced, finds that the warnings required by the Miranda case were not given by the police. Hence, the tapes and exhibits enumerated hereinafter are now in violation of the defendant's constitutional rights and are suppressed. Specifically, these exhibits and tapes were designated before the Grand Jury as Exhibits 21, 22, 23, 24, 25, 26, 27, 28, 30 and 31. It is to be noted that these represent interrogation of the defendant by the police and statements given by him to the police. Part of these recordings commenced within possible permissible limits of "general on the scene questioning surrounding a crime or other gen-

eral questioning of citizens in the fact finding process . . ." (Miranda, supra); but fall because of their utilization in further persistent interrogattion.

However, beyond the suppressed items, the Grand Jury Minutes reflect admissions made by this defendant to a third person (not a policeman) and which admissions are embodied in the record by testimony of the witness and by a tape recording taken by him of a conversation between himself and defendant. (Exhibit 29) Flowing through the Grand Jury Minutes is a fairly consistent stream of testimony indicating that the activity of this individual was police oriented, but this does not exclude the possibility that the admissions to him were untainted by the constitutional prohibition. It may well be that this could be classified as "derivative evidence" and if factually it should appear that it was so, these admissions should be suppressed as the "fruits of the poison tree". (Massiah v. United States, 377 U.S. 201; Goldstein v. United States, 316 U.S. 114; Nardone v. United States, 302 U.S. 379; United States v. Bayer, 331 U.S. 532; Wong Sun v. United States, 371 U.S. 471) This Court cannot, as a matter of law, from the record it reviewed, state that this evidence is now invalid. It requires too much straining of the facts to supply this conclusion as a matter of law from the record, the admissions and tape.

Accordingly, this Court directs that a hearing will be held promptly, at which time there will be explored all of the circumstances surrounding all of the admissions of this defendant, to the third person, both orally and contained in Exhibit 29. Counsel will accordingly make themselves available to the Court for the purposes of setting a date for hearing. The burden will be upon the People to sustain beyond a reasonable doubt the validity of these admissions and the tape taken on the date herein referred to.

Exhibit "B".

A decision on defendant's motion must await completion of the hearing.

Submit order on notice.

DATED: White Plains, N. Y., October 21, 1966.

HON. LEONARD RUBENFELD,
District Attorney,
Court House, White Plains, N. Y.

ELEANOR JACKSON PIEL, Esq.,
Attorney for Defendant,
36 West 44th Street,
New York, N. Y. 10036.

s/ ROBERT E. DEMPSEY,
ROBERT E. DEMPSEY,
County Court Judge.

Exhibit "C"

COUNTY COURT
WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

against

THOMAS ALFRED RUPPERT,

Defendant.

DEMPSEY, J.

The Court, pursuant to it's decision of October 21, 1966, has concluded the taking of testimony from the witness Zvi Almog relating to admissions purportedly made by the defendant to him and to a tape recording designated as Exhibit #29 in the Grand Jury Proceedings.

The Court is convinced that the indictment against the defendant is legal and that this evidence before the Grand Jury met the standards as set forth in Section 249 of the Code of Criminal Procedure.

Defendant's motion to dismiss the indictment is accordingly denied.

Submit order on notice.

DATED: White Plains, N. Y., January 11, 1967.

ROBERT E. DEMPSEY,
ROBERT E. DEMPSEY,
County Court Judge.

HON. LEONARD RUBENFELD,
District Attorney,
Court House,
White Plains, N. Y.

ELEANOR JACKSON PIEL, Esq.,
Attorney for Defendant,
36 West 44th Street,
New York, N. Y.

Exhibit "D"

COUNTY COURT

WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

against

THOMAS ALFRED RUPPERT,

Defendant.

DEMPSEY, J.:

When this case came on for hearing on January 10, 1967, (pursuant to a prior decision of October 21, 1966) the Assistant District Attorney stated for the record that the testimony being offered embraced the issue of the voluntariness of defendant's admissions to one Dr. Ziv Almog. It was thereupon agreed by counsel for all parties that the testimony on the hearing would be submitted for dual purposes; i.e., upon the voluntariness of the admissions of January 24, 1966, as purportedly made by defendant to Dr. Almog (§ 813-f-g Code of Criminal Procedure); and upon the legality of evidence before the Grand Jury as spelled out in the decision of October 21, 1966. This latter issue was resolved by decision of this Court of January 11, 1967. It should be recited for the record that the hearing resulted from a determination on a motion brought by defendant, in which motion a transcript of the testimony before the Grand Jury was sought, or in the alternative defendant urged Court inspection of the minutes and dismissal of the resulting indictment on the ground that said evidence was insufficient to warrant such indictment. The supporting affidavit alleged that the evidence before

the Grand Jury was illegal and resulted from failure to warn defendant of his rights. The Court, on that motion, directed the hearing which later expanded into this Huntley hearing and also suppressed certain statements made to the Yonkers police by defendant, as well as tapes taken of conversations with the defendant at divers times. These statements, as determined in the decision of October 21, 1966, are inadmissible on the trial.

Defendant's resistance to trial admissibility of statements, admissions and confessions made to Dr. Almog on January 24, 1966, is predicated upon the contention that they were psychologically induced with the result that the due process clause was transgressed. The evidence on the present hearing clearly established that as to these inculpatory statements, which will be referred to hereinafter as the January 24th statement; Almog was not a peace officer, nor was he connected with a law enforcement agency, nor was he acting in any capacity as agent for the police. (People v. Leyra, 302 N.Y. 353, 363) The constitutional warnings required by Miranda v. Arizona (384 U.S. 436) are not required to be given under the facts established herein. (People v. Frank, 52 Misc. 2d 266; People v. McKie, N.Y.L.J. 2/7/67, page 18, Nassau County, Oppido, J.; "Constitutional Limitations on Evidence in Criminal Cases", by George, Jr., page 47).

A formidable array of decisions by Appellate Courts outline the concept of "mental coercion". Defendant does not specifically contend that he was "mentally coerced", but rather, among other things, argues that from a personality viewpoint Ruppert was: (1) susceptible to Almog who, as defendant urges "tried to trick defendant into confessing"; (2) Almog falsely extended sympathy to defendant as a method of undermining his free will; and (3) Almog promised to help defendant and the latter attitude on Almog's part was of such a nature as to

deprive defendant of a free choice. These last contentions are summaries of statements in defendant's brief. A brief review of select cases shows a consistent pattern of judicial delineation of the area of psychological impact. Although it is upon the People to establish beyond a reasonable doubt the voluntariness of the confession, discussion of the cases portraying psychological factors as contrasted to actual acts of violence in persuading defendants to confess helps shed judicial light on evidence in this case. Gallegos v. Colorado (370 U.S. 49; 82 S.Ct. 1209; rehearing denied 370 U.S. 965; 82 S.Ct. 1579) involved a youth; long detention (5 day); failure to bring him before a judge; failure to allow his parents to see him; with the result that the Court found lack of due process. Defendant interrogated continuously for 36 hours (Ashcraft v. Tennesee, 322 U.S. 143; 64 S.Ct. 921). A mentally dull 19 year old held incommunicado, who finally confessed, was held denied due process (Thomas v. Arizona, 356 U.S. 390; 78 S.Ct. 885; rehearing denied 357 U.S. 944; 78 S.Ct. 1379). To the same effect are Fikes v. Alabama, (352 U.S. 191; 77 S.Ct. 281; rehearing denied 352 U.S. 1019; 77 S.Ct. 553; Spano v. New York, 360 U.S. 315). Blackburn v. Alabama (361 U.S. 199, 207) where defendant had a long record of mental illness: "But when interrogation of a prisoner is so long continued, with such a purpose, and under such circumstances as to make the whole proceeding an effective instrument for extorting an unwilling admission of guilt, due process precludes the use of the confession thus obtained". Columbe v. Connecticut (1961) (367 U.S. 568, 633; 81 S.Ct. 1860) Columbe was 34 years of age but had a mentality of a child of 9 [page 619]). The confession was so clearly the product of mental coercion that use thereof is inconsistent with due process (Leyra v. Denno, 347 U.S. 556, 561; People v. Leyra, 302 N.Y. 353, 362). Setting aside from

consideration the fact that the foregoing cases portray in the main police interrogation, there is to be gleaned therefrom areas of standards that may be applied to test the motive for the giving of the statement, such as: the age and intelligence of the individual; the period of interrogation; whether the individual was isolated and held incommunicado; were requests to contact family and friends denied (?); was he incarcerated or detained from home (?); was he promptly arraigned (?). These principles relating to "psychological" overbearing of the will are clearly spelled out by our Court of Appeals in People v. Leyra (supra) at pages 362, 364, 365. The totality of attendant circumstances upon the giving of the confession is the touchstone. This Court finds that the statements, admissions and confessions of defendant Ruppert, as made to Dr. Almog on January 24, 1966, were voluntary and admissible on the trial of this indictment. They were not the result of interrelated suppressed interrogations, nor so interwoven therewith as to be a continuous process. The People have sustained the required burden of proof.

The evidence on the hearing establishes that on December 20, 1965, Zvi Almog was Executive Director of the Jewish Community Center in Yonkers. The defendant was a Youth Corps Worker, assigned to the Center. On the late afternoon of that day, Dr. Almog (Ph.D.) was notified of the fire and he went to the Center. The tragic consequences of the fire need not be detailed here. He first met defendant in the parking lot, who told the director that he had a burnt finger resulting from an effort to extinguish the fire. Thereafter, on December 22, 1965, he again met defendant at Police Headquarters in Yonkers, who told him that he was sorry about what had happened and that he, defendant, was accused every time there was a fire. This was the evening of a general police interrogation of a great many persons who were at the Center on the fateful night.

Exhibit "D".

About a week elapsed before Almog saw defendant again and this was when defendant came to the Center in the company of the police. He, Ruppert, told Almog that he was going to show the police around the building. At a previous date the witness had learned of a cigarette flicking episode in the building, as told by Ruppert. Almog, upon learning of this, demanded the police arrest defendant. He also discussed this with his directors. This Court finds nothing unusual in Almog's position of discussing the defendant and his actions with his Board of Directors and the C. Y. O. It would seem natural for a person in Dr. Almog's position of responsibility to explore every facet and avenue of information involving the holocaust with the destruction of twelve persons in the Center. His interest in seeking a cause, as testified to by him, seems a natural course of conduct. He testified that, having been alerted by defendant as to certain facts; namely, that "defendant had flicked a cigarette in the center"; "that defendant was always accused of setting a fire"; and that "he, defendant, was sorry"; he was seeking to isolate confirmation of these admissions and their relation to the cause of the fire. He urged the police to continue to check and interrogate and offered to pursue these leads himself. This resulted in his importuning the police to check Ruppert through Officer Feuer and at the so-called "Board of Directors" meeting.

Later, Dr. Almog asked the Youth Corps to send defendant and an associate Corsino back to work. This was in January 1966. Note must be made that the defendant at no time was ever incarcerated, arrested or jailed. In these various periods of questioning by the police he was free to go. Even at the time Almog asked the Youth Corps for both defendant and Corsino, there was no compulsion for him to return. In January 1966 defendant showed Almog where he had flicked the cigarettes on the fourth floor. On this occasion he volunteered to Almog that he had an arson

record. Almog then went to the Yonkers Police with the Chairman of his Board and they were politely advised that the police would continue and conduct their own investigation. Even a plea to higher authorities (the District Attorney) to accept these statements to Almog as a basis for incarceration of defendant and arrest, met with no approval. At this area of time, defendant discussed freely and frankly with Almog, his family life, and his decision to go into the Navy.

The Feuer episode was not discussed with Almog as far as what defendant said, if anything. On January 13, 1966, Almog suggested to the police that so-called "Board of Directors" meeting. It took place on January 14, 1966 in the Y.W.C.A. Building. Again the Court notes that defendant's attendance was voluntary. His departure was unimpeded. Almog at the meeting importuned defendant with a "possible loss of a job" and "charges of neglect against him, Almog". Corsino was also present at part of the questioning. On January 19, 1966, Almog assisted the police to obtain some cans at the Center. The most that can be said for this move on Almog's part was that this was a duty on his part, as of any other citizen, to respond to the police request. The line of demarcation between police interrogation and Almog's activities is sharp and clear. There was no convergence of these two teams in their efforts to solve the fire which could taint Almog's activities.

There was a snow storm on January 24, 1966. Lamberti, the maintenance man, sent to the Youth Corps for help to shovel snow. The defendant came to the Center. He, defendant, then told Almog that he had lied and that he had told the police the truth that he, Ruppert, had kicked the bucket which contained the fluid that started the fire. This conversation and admissions therein, took place in the lobby of the Center. Dr. Almog sought the services of his tape recorder. He went home. He got his tape recorder.

He recorded this conversation with defendant. Note here too that the uncontradicted evidence is that defendant was under no restraint or compulsion whatsoever. He was free to depart from the Center before Almog returned or at any time. In this conversation, defendant told Almog that on January 19, 1966, defendant had given a statement to the police. To Almog, he admitted that he intended to set the fire and to extinguish it so as to become a hero. Emphasis is placed on time at this point by the Court. Apparently, and the evidence so indicated, a five day span existed from the police interrogation on January 19, 1966 to this confession of January 24, 1966. There is not one bit of evidence but that defendant in this period was free from any contact by anyone (police or Almog) but presumably his family. There is not one bit of evidence in the record but that defendant in this period had no restraint imposed on him, cajolery used toward him, and that he was as "foot loose and fancy free" as any individual. Accepting as believable, Dr. Almog's testimony of this meeting, the result is and the Court so finds, that defendant spontaneously, without suggestion of any sort, willingly and freely admitted his part in setting this fire. Defendant presented no evidence to account for his activities in this five day period of time. Comment will be made later on the testimony of Dr. Boyajian, the psychiatrist called by defendant. The professional opinion expressed by him on this point does not ring with conviction to this Court. This defendant at this time was not in custody; his physical condition was presumably excellent; his fears and hopes were not being played upon and there was no subtle intrusion upon his rights; there was no suggestion to an unwilling, tired mind by persistent and unceasing questioning; all of which appeared in People v. Leyra (supra page 362) to taint the latter's confession. This acceptable testimony

of Dr. Almog is, as to the actions on January 24, 1966, unchallenged in any respect.

At the conclusion of the taping, Almog took the tape into Police Headquarters. He gave the police an affidavit. He left and after making a stop he went home. He says that Ruppert, who had been picked up by the police, called him and said he wanted to tell him, Almog, more about the fire. He went there. The police had taken a statement and he waited there until the typing was completed. On the way home that night, defendant now talked to Almog about the fire. He described in detail the setting of the fire. This confession took place in Almog's car. The Court cannot help but observe that this defendant voluntarily called Dr. Almog and asked him to come to him. He was under no coercion to call Almog. There was no compulsion, no suggestion that he do this. Again defendant exhibited a degree of voluntariness which cannot be glossed over by unacceptable expert testimony. He left freely, with Almog, after his statement to the police. He was not under arrest at that point. The effort to convey proof that he was susceptible to Dr. Almog, who indeed was near him, is not proof that his will was so overborne that he was deprived of reason and a capacity of free choice. The Court finds that these statements; namely, those given to Dr. Almog in the car on the evening of January 24, 1966, are also voluntary and admissible on the trial.

Called by the defendant in this hearing were innumerable police officers. The relevancy of their testimony is not apparent to this Court and hence, not reviewed in detail. The major direct examination smacked of a "fishing expedition" without merit. The police interrogation and statements had been previously suppressed on defendant's motion. In substance, this testimony showed interrogation of Ruppert on December 22, 1965 for several hours and

his release; subsequent interrogation on December 28, 1965 and release; interrogation on January 14, 1966 and release; interrogation on January 19, 1966 and release; interrogation by police of defendant on January 24, 1966 and release. There were many hours of persistent questioning by the police. As heretofore indicated, these statements were suppressed and deemed inadmissible for trial purposes. Although the police questioned him long and persistently, incriminating admissions, if any, that were given, did not result in his detention or arrest and he left the police and was free from any restraint.

Persistent demand was made upon this hearing for the police tapes, which was denied by the Court. They are not admissible upon the trial. In Weeks v. United States (232 U.S. 383 [1941]), the Supreme Court of the United States generated the rule that papers illegally seized should not be permitted to be used upon a trial. The principle was reiterated and positioned in our system of jurisprudence by Mr. Justice Holmes in Silverthorne Lumber Co. v. United States (251 U.S. 385, 392), where he ruled for the Court: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (See Am. Jur. Vol. 20, § 393, page 353). Our Court of Appeals ruled that statements rendered inadmissible may not be used by the prosecution as part of a direct case, and grafted an exception to the rule of *Silverthorne* to the limited extent of allowing the use of an inadmissible statement for the purposes of testing the credibility of the defendant. (People v. Kulis, 18 N.Y.2d 318 [1966]) Except for this limited purpose presently recognized by our Court of Appeals in the Kulis case, inadmissible evidence may not be used and this proscription applies to the defendant and plaintiff. To permit defendant on his hearing to explore inadmissible

evidence, would be to make that admissible which is not admissible.

Defendant sought to elicit from two witnesses certain testimony into the proximity of proof of mental coercion or psychological inducement. To this end, a teacher at the Linden Hall School at Hawthorne, New York, was examined. Defendant Ruppert was in his class in the year of 1964. Outside of characterizing defendant's attitude; to wit, "Worked hard to improve his skill"; "worked well in group situation"; "completed more work than others in the class"; "attitude wonderful"; he said that on one occasion he (defendant) admitted doing something, which admission was later recanted and that it was discovered he did not do it. The other witness was Doctor Boyajian, a psychiatrist. In a salient area, Dr. Boyajian, as an expert witness, faces an impediment. In People v. Mathias (20 A.D.2d, 696; 246 N.Y.S. 2d 783) where the prosecution's sole witness on the issue of sanity was a psychiatrist, in reversing the conviction, the Appellate Division said that the testimony of the psychiatrist "was based in part on conversations had with other psychiatrists who had not testified at the trial and upon medical records, none of which had been admitted into evidence. Such material may not be considered by an expert witness in forming his opinion. (People v. Samuels, 302 N.Y. 163, 172; 96 N.E.2d 757, 762) The witness also based his opinion in part on his knowledge of the trial record. However, a witness may only base his opinion upon the testimony in the trial record if such testimony is included within a properly presented hypothetical question. (People v. Keough, 276 N.Y. 141, 145; 11 N.E.2d 570, 572) In this case, not only did the witness base his opinion upon the trial record—apart from the hypothetical question—but the hypothetical question itself was improper in form. A hypothetical question should be so framed as to enable

the expert to tender his opinion based upon the assumption that the facts hypothetically stated to him are true. (People v. McElvaine, 121 N.Y. 250; 24 N.E. 465; Matter of Bergman v. Mergenthaler Linotype Co., 274 App. Div. 553; 85 N.Y.S. 2d 124; Christastie v. Elmira Water, Lights and Railroad Co., 202 App. Div. 270; 195 N.Y.S. 156)." To the same effect, Richardson on Evidence, § 389, page 384. For example, the doctor in this hearing arrived at the conclusion of defendant's condition based upon statements from areas such as: adjustment in institutions, based not upon specific facts relating to defendant, but his knowledge of institutions; which is dehors the record; suggestion that the defendant was in an orphanage (by some outside person) which was not a matter in evidence; a memorandum prepared by Mrs. Piel; a transcript of Dr. Almog's Grand Jury testimony; a transcript of a record from Hawthorne Cedar Knolls; none of which were in evidence; and all of which appeared to have been considered by the doctor in expressing a somewhat vague irrelevant opinion. Illumination of the doctor's opinion can be found in his admission that he, the doctor, was unable to disagree with a report that had been made by the Grassland Psychiatric Institute about a year before the hearing, on February 8, 1966, and which was marked Court's "Exhibit Z". On cross examination, the witness candidly stated he was unable "to disagree with anything that was done a year ago". The infirmities in his testimony and its shaky weight and the improper predicates of assumption would well have warranted striking the opinion from the record under the authorities. Yet this is his opinion as given in reply to this question:

> Q. Now assuming all these facts, do you have an opinion concerning the susceptibility of the boy with reference to the director? A. Yes, if you could restate the question because I get lost, yes. (Italics ours —Almog)

Exhibit "D".

Then there was an amendment to the question and substantially the same question and answer was given.

> Q. With regard to susceptibility, was he—was he or was he not susceptible? What is your opinion in that regard? A. Yes, I think he is.
>
> Q. Is what?
>
> Q. Let me restate it, would the boy be susceptible to the suggestion of the director? A. Yes, I think he would.

Strenuous efforts by argument of counsel to convert this type of testimony into an acceptable basis for a finding that defendant's will was so overborne, or that his statements and confessions to Dr. Almog were not the product of a free choice under the facts and circumstances in this case did not supply proof. It was sophistry. There is no testimony in this record to supply the gap of time from the 19th to the 24th of January, 1966, and the psychiatrically announced testimony that they (the statements of the 19th and the Almog confession of the 24th) were related without some explanation of defendant's whereabouts and activities in the meantime, cannot be given enough weight to overcome the People's proof of voluntariness. The hearing record is devoid of any statement as to defendant's mental or emotional condition in this vital area. Further elaboration or review of the doctor's testimony on direct and cross examination would be cumulative comment. In arriving at the rejection of defendant's proof, the Court has reviewed the doctor's testimony and those exhibits which were part of this hearing record. The conflict between the examination at Grasslands hereinbefore referred to, which was a thorough objective effort to analyze defendant, both mentally and emotionally, and the doctor's sincere but unconvincing testimony are resolved adversely to defendant.

Exhibit "D".

The admissions, statements and confessions of defendant on January 24, 1966, to Dr. Almog, are admissible upon the trial. This Court finds as a matter of law that they were voluntary and not psychologically coerced and that the People have sustained the burden imposed upon them to prove the proof of voluntariness beyond a reasonable doubt. The findings of fact are incorporated in this decision.

The Court notes that defendant has been incarcerated for over a year on this charge and directs that the trial of this case shall be set down promptly. It is in fulfillment of this direction that this Court sets the trial date as April 4, 1967.

Submit order on notice.

DATED: White Plains, N. Y., March 16, 1967.

ROBERT E. DEMPSEY,
ROBERT E. DEMPSEY,
County Court Judge.

HON. LEONARD RUBENFELD,
District Attorney.
THOMAS A. FACELLE, Jr.,
Assistant District Attorney,
Court House,
White Plains, N. Y.

ELEANOR JACKSON PIEL, Esq.,
Attorney for Defendant,
36 West 44th Street,
New York, N. Y.

Exhibit "E"

COURT OF APPEALS

STATE OF NEW YORK

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

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2. No. 182. 71

THE PEOPLE &c.,

Respondent-Appellant,

vs.

THOMAS ALFRED RUPPERT,

Appellant-Respondent.

PER CURIAM:

Upon the prior appeal we reversed the judgment and ordered a new trial, which would permit of a further *Huntley* hearing to consider the "basic issue" whether the suppressed police confessions, as related to Almog by defendant, so tainted the Almog statements as to render them likewise inadmissible; the tests to be applied upon the new inquiry being those announced in *Wong Sun* v. *United States* (371 U. S. 471, 478) and *Clewis* v. *Texas* (386 U. S. 707, 710), quoted in our opinion. (26 N Y 2d 437, 443.) Following the further *Huntley* hearing, the County Court found that the Almog statements were indeed thus tainted, and accordingly suppressed them; and subsequently, upon appropriate motion, dismissed the indictment.

Exhibit "E".

In modifying the suppression order with respect to certain of the statements made to Almog, the Appellate Division erred to the extent that it rested its determination upon factors (e.g., absence of custodial restraint) not relevant to the taint issue (35 A D 2d 1017, 1019); but we find, in any event, no substantial evidence supportive of the Appellate Division's finding upon reversal of the County Court's determination, under the standards by which our review is governed (see *People* v. *Leonti,* 18 N Y 2d 384, 389, mot, for rearg. den. 19 N Y 2d 633, cert. den. 389 U. S. 1007; *People* v. *Ledwon,* 153 N. Y. 10, 16).

* * * * * *

Order reversed and the orders of the County Court reinstated. Opinion Per Curiam. All concur.

Exhibit "F"

9 THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. THOMAS ALFRED RUPPERT, Respondent.—Appeal by the People from two orders of the County Court, Westchester County, the first dated September 11, 1970, granting defendant's motion to suppress all admissions and confessions made from December 22, 1965 to January 24, 1966 by defendant to Zvi Almog, Director of the Jewish Community Center of Yonkers, and the second dated October 16, 1970, granting defendant's motion to dismiss the indictment. Order dated September 11, 1970 modified by (1) excepting from the determination therein Almog's conversations with defendant on December 22, 1965 and on the evening of January 24, 1966 and (2) adding a provision thereto that the suppression motion is denied as to said conversations. As so modified said order is affirmed. Order dated October 16, 1970 reversed, motion to dismiss indictment denied and indictment reinstated. This appeal involves the conflagration that occurred on December 20, 1965, at the Jewish Community Center in Yonkers, in which 12 persons perished. Experts testified that arson was indicated. Defendant, who was 16 years old when the fire occurred, was then in the employ of the Community Center. Prior to his employment, which he had obtained through the Youth Corps, he had a history of some mental disturbance. Further, he had been adjudicated a "neglected child" by the Family Court when he was nine years of age. Following the fire, he discussed the tragedy with Dr. Zvi Almog (a doctor of philosophy) who was the Director of the Center. He allegedly told Almog, before December 22, 1965, that he had burned his hand in trying to put out the fire. On December 22 he allegedly told Almog that "every time there is a fire, he [defendant] has been accused of it". Almog reported this conversation to the police. Defendant became a prime suspect in the police investigation as to who had caused the conflagration. He was interrogated

by the police on a number of occasions between December 29, 1965 and January 24, 1966. Almog took an active part in the investigation. Defendant allegedly confessed to the police on January 24, 1966 that on December 20, 1965 he had an urge to set a fire. He then allegedly gave the police officers a detailed description of how he had (1) found, in the basement of the Center, a can marked "highly flammable", (2) stacked chairs against an entrance door on the fourth floor, (3) poured the contents of the can over objects in the stairwell leading to the fourth floor and the balcony on the third floor and (4) lit a match after the contents of the can had been disposed of, whereupon a "very big" fire erupted. After defendant had allegedly made this confession to the police, he telephoned Almog to take him home from the police station. Almog came for that purpose. While riding along with Almog and going home in Almog's automobile, defendant allegedly also made a full confession to Almog of his compulsive incendiarism resulting in this tragedy. On May 27, 1966, defendant was indicted by the Grand Jury of Westchester County, charged with first degree murder of the 12 persons who had died in the fire and also with arson in the first degree. He pleaded not guilty. On October 21, 1966, the County Court held, in connection with a motion which had theretofore been made on behalf of defendant to dismiss the indictment, that (1) the admissions and confession given by him to the police should be suppressed because the *Miranda* warnings (*Miranda* v. *Arizona*, 384 U. S. 436) had not been given to him, (2) even though *Miranda* had not been decided when the police interrogated him, nevertheless noncompliance with the *Miranda* rule applied to cases which had not been tried prior to the *Miranda* decision and (3) a *Huntley* hearing should be held to determine whether defendant's admissions and confession to Almog should be suppressed (cf. *Miranda* v. *Arizona*,

supra; Johnson v. *New Jersey,* 384 U. S. 719). Pursuant to that decision a *Huntley* hearing was held between January 10 and January 26, 1967. On March 16, 1967 the County Court determined, *inter alia,* that the alleged admissions and confession to Almog were voluntarily made, were not coerced psychologically or otherwise and were not tainted by the illegal admissions and confession which defendant had allegedly made to the police. By order dated March 22, 1967, the County Court denied the motion (to dismiss the indictment) and denied suppression of the admissions and confession to Almog. On June 13, 1967 a judgment convicting defendant of murder in the first degree and arson in the first degree was rendered by the County Court after a lengthy jury trial. Defendant repudiated his alleged confession to Almog in that trial. The judgment was affirmed by this court, but the Court of Appeals reversed and ordered a new trial on the grounds that defendant should have been permitted to examine the police tapes of his interrogation and part of the Grand Jury minutes, on the issue as to whether his admissions and confessions to the police, found to be illegal under *Miranda* standards, were so inextricably related to the admissions and confession made by defendant to Almog as to have tainted the latter admissions and confession—for if the latter were so tainted they should also be suppressed (*People* v. *Ruppert,* 32 A D 2d 890, revd. 26 N Y 2d 437). Moreover, the Court of Appeals determined that the reversal of the judgment permitted a further *Huntley* hearing to be held as to the admissions and confession to Almog and that in the light of the evidence produced at such further *Huntley* hearing defendant might renew his motion to dismiss the indictment. Pursuant to the Court of Appeals' determination a further *Huntley* hearing was held between July 27, 1970 and September 3, 1970, at which tapes of defendant's confession to the police and part of

the Grand Jury minutes were available to defendant. On September 11, 1970 the County Court rendered its decision and order here under review wherein it directed that "all statements made by defendant to Almog are suppressed." In our opinion, the admission made by defendant to Almog on December 22, 1965 that "every time there is a fire, he has been accused of it" is not related in any way to the police interrogation and should not have been suppressed. Further, it is our opinion that the alleged confession made by defendant to Almog on the evening of January 24, 1966, when Almog came to take him home from the police station, is not inextricably interrelated with his prior confession to the police and should not have been suppressed. Defendant was alone with Almog at the time. He was not in police custody or under police constraint at that time. He had a good relationship with Almog. He was free to go where he wished and there is evidence from which it might reasonably be concluded that, in making this alleged confession to Almog of his alleged compulsion in setting the fire on December 20, 1965, defendant may have been purging his conscience or may have been admitting to a psychotic tendency towards pyromania. The statement to Almog on December 22, 1965, and the confession to Almog on the evening of January 24, 1966, together with the other unsuppressed evidence before the Grand Jury, in our opinion, are sufficient to sustain the indictment. Munder, Acting P. J., Kleinfeld and Benjamin, JJ., concur; Martuscello, J., dissents and votes to hold the appeal in abeyance pending a remand to the court below with a direction that it make its own independent findings as to whether the confession was tainted by the previous admissions to the police. It appears that the County Court erroneously determined that the Court of Appeals had indicated that there should be a finding that the admissions were tainted. Brennan, J., dissents and votes to affirm the orders.

Exhibit "G"

Decision and Order by Beisheim, J., Dated September 11, 1970, Suppressing Confession Made to Zvi Almog.

COUNTY COURT,

COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS ALFRED RUPPERT,

Defendant.

BEISHEIM, J.:

The defendant has been indicted for the crimes of arson and murder arising out of a fire which occurred in the Jewish Community Center in the City of Yonkers on December 20, 1965, which fire, the indictment charges, was willfully set by the defendant and, as a result thereof, took the lives of 9 children and 3 adults. Defendant was previously convicted on June 13, 1967, after trial by jury, of arson causing the fire and of the murder of the 12 persons whose deaths ensured. Prior to the trial of the defendant, certain admissions and a confession given by the defendant to members of the Yonkers Police Department were suppressed by the learned trial judge upon the ground that the defendant had not been advised of his constitutional rights as prescribed in *Miranda* v. *Arizona,* 384 U. S. 436. It should be noted in passing that at the time of the questioning of the defendant by the police, the *Miranda* case, *supra,* had not been decided, so, in effect, the police were subject to certain after-adopted procedures which were not in effect at the time

of the questioning of the defendant. The rules of the *Miranda* decision were made retroactive to all cases that had not been tried by the Supreme Court in the case of *Johnson* v. *New Jersey*, 384 U. S. 719.

The learned trial judge also conducted a pretrial hearing in connection with defendant's motion to suppress a confession made by the defendant to one Zvi Almog, director of the Jewish Center. At this pretrial hearing, the trial judge denied permission to the defendant to inspect the confessions previously given by the defendant to the police or to have access to the tape that recorded the interrogation of the defendant and, at the conclusion of the hearing, the trial judge denied defendant's motion to suppress the confession given to Almog, finding the same to be "voluntary and not psychologically coerced".

The Appellate Division, Second Department, unanimously affirmed the conviction of the defendant but the Court of Appeals reversed the conviction (26 N. Y. 2d 437) stating, among other things:

> "The repeated denials of defendant's applications to inspect the police confessions constituted serious error, requiring reversal of the judgment and a new trial; the denials depriving defendant of an opportunity to demonstrate that the activities and procedures of Almog and the police leading to the procurement of the separate confessions were so closely, if not, indeed, inextricably interrelated as to taint the Almog confession with the conceded defects of the police confessions from which the Almog confession seems to have flowed." (p. 440)

After the case was remanded to the Westchester County Court for a new trial, defendant brought a motion to inspect the Grand Jury minutes and to dismiss the indict-

ment and also for a new Huntley hearing, in connection with which the defendant sought permission to inspect the confessions and to listen to the tapes of the interrogation of the defendant by the police.

Inasmuch as the undersigned, as well as the defendant, had not heard the tapes of the police interrogations, the Court directed that these tapes be played as part of the new Huntley hearing, and the same were played in the open Court in the presence of the defendant and his counsel and an Assistant District Attorney and are part of the record of the new Huntley hearing. Thereafter, the People called Zvi Almog, Commissioner (formerly Captain) Frank Vescio, and Chief William Polsen of the Yonkers Police Department to the stand and rested its case upon the tapes and the testimony of these three witnesses. The defendant moved to suppress all oral statements made by the defendant to Almog and a recorded statement given by defendant to Almog on January 24, 1966.

In deciding defendant's motion, the Court is doing so under the following guidelines:

(1) That the decision of the Judge who presided over the previous trial suppressing the admissions and confessions made by the defendant to the police as in violation of the rules laid down in *Miranda v. Arizona, supra,* still stands since such decision was impliedly, if not expressly, approved by the Court of Appeals and no attempt was made by the People to relitigate this issue in connection with the new trial.

(2) That this Court is bound by the guidelines laid down by the Court of Appeals in its decision reversing the conviction, to wit,

(a) ". . . [T]hat the activities and procedures of Almog and the police leading to the procurement of the separate confessions . . ." might be ". . . closely, if not, indeed, inextricably interrelated as to taint the Almog con-

fession with the conceded defects of the police confessions from which the Almog confession seem to have flowed"; (p. 440)

(b) That through a chain of interrogation of the defendant lasting 33 days, except for one statement of minor importance made by the defendant to Almog on December 22, 1965, "From that time on, all inculpatory statements given to Almog had been first given to the police, or to the police and Almog jointly.", and that "All during this period it is clear that Almog, if not an agent of the police in that he was directed by them . . . was at least in close collaboration with them, and it is also evident that the information illegally taken by the police was directly connected in each instance to information taken by Almog"; (p. 442)

(c) "In this case, disclosure is required because the evidence presented the clear probability that the Almog confession flowed naturally, perhaps inexorably, and in point of time immediately, from the police confession . . ." (p. 443)

The recordings on the tapes and the testimony of Almog, Chief Polsen and Commissioner Vescio at the hearing reveal nothing inconsistent with what this Court regards as the "quasi-finding", or at least a stong indicative guideline by the Court of Appeals that the Almog confession was tainted by the admissions and confessions previously made to the police.

This Court, therefore, finds, in view of the decision of the Court of Appeals, that the statements and confessions made by the defendant to Almog were not voluntarily made beyond a reasonable doubt by reason of the fact that they flowed from and were tainted by the previous admissions and confessions given to the police; accordingly, all statements made by defendant to Almog are suppressed.

Exhibit "G".

The Court denies defendant's motion to inspect the Grand Jury minutes and to dismiss the indictment without prejudice to renew the same upon a proper showing within the principles outlined in *People v. Howell*, 3 N. Y. 2d 672.

The aforesaid constitutes the decision and order on the motion.

The District Attorney is directed to serve a copy of this decision and order, with notice of entry, upon defendant's counsel.

Dated: White Plains, N. Y.
September 11, 1970

GEORGE BEISHEIM, JR.
County Court Judge

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